SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 670.

WILLIAM McCOACH, COLLECTOR OF INTERNAL REVENUE, PETITIONER,

VS.

MINEHILL AND SCHUYLKILL HAVEN RAILROAD COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

INDEX.

a

TRANSCRIPT OF RECORD.

MARCH TERM, 1912.

No. 1600.

In the United States Circuit Court of Appeals for the Third Circuit.

WILLIAM McCOACH, COLLECTOR OF INTERNAL REVENUE, PLAINTIFF IN ERROR,

v.

MINEHILL AND SCHUYLKILL HAVEN RAILROAD COMPANY, DEFENDANT IN ERROR.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Filed February 19, 1912.

1 In the Circuit Court of the United States for the Eastern District of Pennsylvania.

April session, 1911.

MINEHILL & SCHUYLKILL HAVEN RAILROAD COMPANY

v.

WILLIAM McCOACH, COLLECTOR OF INTERNAL REVENUE.

Docket entries.

MINEHILL & SCHUYLKILL HAVEN Railroad Company, *v.* WILLIAM McCOACH, COLLECTOR OF Internal Revenue.	G. W. Pepper, Eli Kirk Price, 1494, J. W. Thompson.

1911, August 8: Petition for writ of certiorari filed. Certiorari exit returnable the first Monday of September next.

September 21: Certiorari returned with record annexed and filed.

October 17: Affidavit of defense filed.

October 31: Rule for judgment for want of a sufficient affidavit of defense filed. Order to place case on argument list filed.

December 4: Argued.

2 1912, January 2: Opinion, McPherson, J., making absolute rule for judgment for want of a sufficient affidavit of defense filed.

January 10: Præcipe for judgment and assessment of damages filed. Judgment accordingly. Damages assessed at five thousand one hundred and ninety-one and 33/100 ($5,191.33) dollars.

January 18: Certificate of probable cause filed. Assignments of error filed. Petition for writ of error filed. Order allowing petition for writ of error filed. Writ of error allowed and copy thereof lodged in clerk's office for adverse party. Citation allowed and issued.

February 17: Citation returned "service accepted" and filed.

Petition for writ of certiorari.

(Filed Aug. 8, 1911.)

To the honorable the judge of the Circuit Court of the United States, Eastern District of Pennsylvania:

The petition of William McCoach, collector of internal revenue for the first collection district of Pennsylvania, respectfully represents:

That suit has been commenced by summons in assumpsit against him as defendant by the Minehill & Schuylkill Haven Railroad Company in the Court of Common Pleas No. 4, for the county
3 of Philadelphia in the State of Pennsylvania, to June term, 1911, No. 4094.

That the said suit is brought on account of an act done under the internal-revenue laws of the United States by him, the said William McCoach, as collector of internal revenue for the first collection district of Pennsylvania, the said suit being to recover a certain sum of money paid as internal-revenue taxes by the said Minehill & Schuylkill Haven Railroad Company to the said William McCoach as collector as aforesaid.

Your petitioner respectfully prays that the said cause may be entered on the docket of your honorable court and proceeded in as a cause therein originally commenced, and that a writ of certiorari be issued to the clerk of your honorable court to the said court of common pleas No. 4, for the county of Philadelphia, to send to the said Circuit Court of the United States for the Eastern District of Pennsylvania the record of the proceedings in the said cause, according to the provisions of the act of Congress in such case made and provided.

And he will ever pray, etc.

WILLIAM McCOACH.

William McCoach, collector of internal revenue for the first collection district of Pennsylvania, being duly sworn according to law,

doth depose and say that the facts set forth in the foregoing petition are true to the best of his knowledge and belief.

WILLIAM McCOACH.

Sworn to and subscribed before me this 8th day of August, A. D. 1911.

T. L. COBAUGH,
Deputy Clerk, District Court, United States,
Eastern District of Pennsylvania.

4 I hereby certify that, as attorney for the above-named petitioner, I have examined the proceedings against him and have carefully inquired into all the matters set forth in the above petition, and that I believe the same to be true.

J. W. THOMPSON,
United States Attorney, Attorney for Petitioner.

Exemplification.

PHILADELPHIA COUNTY, STATE OF PENNSYLVANIA, *Sct.:*

Among the records and proceedings of the court of common pleas No. 4, for the County of Philadelphia, State of Pennsylvania, the following may be found as matter of file and of record, at No. 4094, June term, 1911, to wit:

DOCKET ENTRIES.

(June term, 1911.)

MINEHILL & SCHUYLKILL HAVEN RAILROAD CO.
v.
WILLIAM McCOACH. } Price & Pepper, 4094.

Aug. 1, 1911, statement & rule to file afft. of defence filed.
Aug. 14, 1911, afft. of service of statement & rule to file afft. of defence on Aug. 3, 1911, filed.
Sums. Asspt.
Exit Aug. 1, 1911.
Ret. 1st Mon., Aug., 1911.
Aug. 9, 1911, certiorari from Circuit Court U. S. of April sess., 1911. No. 1494.
Certified from the record the 17th day of August, A. D. 1911.

CHAS. MEARS,
Pro Prothy. [SEAL.]

5 PRAECIPE FOR SUMMONS ASSUMPSIT.

(Filed Aug. 1, 1911.)

To the Prothonotary C. P.:

Issue summons assumpsit in the above-entitled cause. Returnable first Monday of August, 1911.

G. W. Pepper,
Eli Kirk Price,
Per Lewis,
Attorneys for Plaintiffs.

August 1, 1911.

SUMMONS.

County of Philadelphia, *ss:*

The Commonwealth of Pennsylvania, to the sheriff of the county of Philadelphia, greeting:

We command you that you summon William McCoach, late of your county, so that he be and appear before our judges, at Philadelphia at our court of common pleas No. 4, for the county of Philadelphia, to be holden at Philadelphia, in and for the said county on the first Monday of August inst., there to answer the Minehill & Schuylkill Haven Railroad Company of a plea of assumpsit. And have you then and there this writ.

Witness the Honorable Robert N. Willson, president of our said court, at Philadelphia the 1st day of August, in the year of our Lord one thousand nine hundred and eleven (1911).

J. U. G. Hunter, *Prothonotary.*

Form 112.

Served William McCoach, the within-named defendant, by handing to him personally, within the county of Philadelphia, State of
6 Pennsylvania, on Aug. 3, 1911, a true and attested copy of the within writ together with a copy of plaintiff's statement of claim and notice of rule to file affidavit of defense within fifteen days or judgment *sec. reg.*

So answers,

George H. Rahn,
Deputy Sheriff.
Joseph Gilfillan,
Sheriff.

Sheriff's appearance.
Docket No. 28638.

(Endorsed: 4094. June Term, 1911. C. P. No. 4. Copy. The Minehill & Schuylkill Haven Railroad Co. *v.* William McCoach. Summons assumpsit. Statement. J. W. Pepper, Eli K. Price.)

PLAINTIFF'S STATEMENT OF CLAIM.

The Minehill and Schuylkill Haven Railroad Company, a corporation duly formed and existing under the laws of the Commonwealth of Pennsylvania, brings this suit to recover from the defendant, William McCoach, the sum of five thousand fifteen dollars twenty-three cents ($5,015.23), with interest thereon as hereinafter stated, upon the cause of action whereof the following is a statement:

The defendant, William McCoach, was, on the twentieth day of April, 1911, and still is the collector of internal revenue for the eastern district of Pennsylvania, being duly commissioned as such pursuant to the laws of the United States.

On or about the twentieth day of April, 1911, the United States Commissioner of Internal Revenue, presuming to act by virtue of due legal authority conferred by statutes of the United States Con-

7 gress, assessed against the plaintiff as a corporation, having a capital stock and alleged to be engaged in business in Pennsylvania, an internal revenue special excise tax of $2,461.34, alleged to be due from said corporation to the United States for the year ending December 31, 1909, and further assessed against the said corporation a penalty of $123.07 and interest $24.61, amounting together to $147.68, for alleged neglect and failure on the part of said corporation to make payment of said tax. Under date of April 20, 1911, the said commissioner, presuming to act as aforesaid, assessed against the plaintiff, as a corporation, having a capital stock and alleged to be engaged in business in Pennsylvania, an internal revenue special excise tax of $2,406.21, alleged to be due from said corporation to the United States for the year ending December 31, 1910.

The lists upon which said assessments appeared were thereafter duly transmitted to the defendant as collector aforesaid. The defendant thereupon made formal demand for the payment of said taxes and penalties so assessed, and informed the defendant that in default of payment the said taxes and penalty would be collected by distraint and sale of the plaintiff's property.

Under date of the twenty-fourth of May, 1911, the plaintiff paid to the defendant the amount of the said tax for the year 1909, penalty and interest, to wit, $2,609.02, but at the same time filed with the defendant a written protest, a copy of which is hereto annexed and marked Exhibit A. Under date of June 28, 1911, the plaintiff paid to the defendant the amount of the said tax for the year 1910, to wit, $2,406.21, but at the same time filed with the defendant a writ en protest, a copy of which is hereto annexed marked Exhibit B.

Under date of May 26, 1911, the plaintiff filed with the defendant

8 a claim for refund of the said $2,609.02, special excise tax and penalty. A copy of said claim for refund is hereto annexed marked Exhibit C. Under date of June 28th, 1911, the plaintiff filed with the defendant a claim for refund of the said $2,406.21 special excise tax. A copy of the said claim for refund is hereto annexed marked Exhibit D.

After consideration of the said claim for refund of the said tax of 1909, penalty and interest, the Commissioner of Internal Revenue rejected the same. Under date of June 21, 1911, the defendant through James H. Wilkes, the deputy collector in charge, addressed to the plaintiff a letter, a copy of which is hereto annexed and marked Exhibit E, in which the plaintiff was notified that the plaintiff's claim for refund of the said tax of 1909, penalty and interest, had been examined and rejected by the Commissioner of Internal Revenue for the reasons therein set forth. After consideration of the said claim for refund of the said tax of 1910, the said Commissioner of Internal Revenue rejected the same. Under date of July twenty-fourth, 1911, the defendant addressed to the plaintiff a letter, a copy of which is hereto annexed marked Exhibit F, in which the plaintiff was notified that the plaintiff's claim for refund of the tax of 1910 had been examined and rejected by the Commissioner of Internal Revenue for the reasons therein set forth.

Plaintiff avers that the said taxes and penalty were unjustly and illegally assessed against it by the Commissioner of Internal Revenue and were illegally and wrongfully collected from the plaintiff by the defendant as collector as aforesaid, for the following reasons, to wit:

Under date of December 31, 1896, the plaintiff entered into an agreement of lease with the Philadelphia and Reading Railway Company, a copy of which agreement is hereto annexed, marked Exhibit G, and pursuant to said agreement of lease the plaintiff has
9 turned over to the said Philadelphia and Reading Railway Company the entire railroad of the plaintiff and all the property described in said lease, since which time the entire railroad and property theretofore operated by the plaintiff has been operated by the Philadelphia & Reading Railway Company, and the plaintiff has not been engaged in business or been engaged in carrying on or doing business of any sort. The plaintiff is advised, believes, and therefore avers, that the execution and delivery of the said lease, the turning over of its said property to the Philadelphia and Reading Railway Company and the cessation of doing of business as aforesaid by the plaintiff was duly authorized by law.

The plaintiff is advised, believes, and therefore avers, that there existed no warrant in law for the assessment by the said commissioner of the said special excise taxes alleged to be due from the plaintiff as a corporation with capital stock engaged in doing business as aforesaid, and especially that there existed no warrant in law for demanding and collecting from the plaintiff the said penalty and interest for its alleged failure to make payment of the said tax of 1909, there being no statute or law of the United States Congress imposing such taxes and penalty upon the plaintiff.

Wherefore the plaintiff brings this suit to recover from the defendant the amount of the said tax of 1909, penalty and interest, to wit, $2,609.02, together with interest thereon from May 24, 1911, and the amount of the said tax of 1910, to wit, $2,406.21, wrongfully col-

lected from it by the defendant, together with interest from June 28th, 1911.

G. W. PEPPER,
Per LEWIS,
ELI KIRK PRICE,
Attorneys for Plaintiff.

10 COMMONWEALTH OF PENNSYLVANIA,
County of Philadelphia, ss:

William Biddle, being duly affirmed according to law, deposes and says that he is treasurer of the Minehill and Schuylkill Haven Railroad Company, plaintiff above named, and that the facts set forth in the foregoing statement as the basis of claim thereof are true.

WM. BIDDLE.

Affirmed and subscribed before me this twenty-eighth day of July, A. D. 1911.

[SEAL.] HOWARD W. HANSON,
Notary Public.

Commission expires January 21, 1916.

EXHIBIT A.

OFFICE OF THE
MINEHILL AND SCHUYLKILL HAVEN RAILROAD COMPANY,
119 S. Fourth St., Philadelphia, 5/24, 1911.

WILLIAM McCOACH,
United States Internal Revenue Collector,
First District, Pennsylvania, Philadelphia.

RESPECTED FRIEND: We hand herewith certified check to thy order for $2,604.10 and check for $4.92/100 (total, $2,609.02), being the full amount of tax, with interest, assessed against the Mine Hill & Schuylkill Haven Railroad Co., under the internal-revenue laws of the United States, to wit, the special excise tax of 1909.

We beg to state that the payment is made solely because of the demand and threat of collection. The payment is, however,
11 made under protest, because the assessment of the tax was illegal, and its collection is illegal.

We also return as requested thy receipt for the above amount dated May 27th, 1911.

Very respectfully,

(Sgd.) WILLIAM BIDDLE,
Treas'r, Mine Hill & Schuylkill Haven R. R. Co.

EXHIBIT B.

OFFICE OF THE
MINE HILL & SCHUYLKILL RAILROAD COMPANY,
119 S. Fourth St., Philadelphia, 6/28/1911.

WM. McCOACH,
United States Internal Revenue Collector,
First District, Pennsylvania, Pennsylvania.

RESPECTED FRIEND: We hand herewith certified check to thy order for $2,406.21, being the full amount of tax assessed against the Mine Hill & Schuylkill Haven Railroad Co., under the internal-revenue laws of the United States, to wit, the special excise tax of 1910.

We beg to state that this payment is made solely because of the demand. The payment, however, is made under protest, because the assessment of the tax was illegal, and its collection illegal.

Very respectfully,

WM. BIDDLE,
Treasurer, Mine Hill & Schuylkill Haven R. R. Co.

12 EXHIBIT C.

Claim under series 7, No. 14, revised, and series 7, No. 27, supplement No. 1, for taxes improperly paid, or refundable under remedial statutes and for amounts paid for stamps used in error or excess.

U. S. Internal Revenue.

STATE OF PENNSYLVANIA, COUNTY OF PHILADELPHIA, *ss:*

William Biddle, jr., of the * city of Philadelphia and State and county aforesaid, being duly affirmed according to law, deposes and says, that † he is the treasurer of the Mine Hill and Schuylkill Haven Railroad Company, a corporation authorized to engage in, but not actually engaged in the business of carrying freight and passengers for hire, that upon the twentieth day of fourth month (April), A. D. 1911, it was assessed a special excise internal-revenue tax of two thousand six hundred and nine 00/100 dollars,‡ with respect to the carrying on or doing business by said corporation during the year 1909, under the act of Congress of August 5, 1909, which amount he afterwards, on the twenty-sixth day of fifth month (May), A. D. 1911, paid with penalty and interest amounting together with the tax to $2,609.02, to William McCoach, Esq., collector of internal revenue for the first district of Pennsylvania, and which amount, as this deponent verily believes, should be re-

* Give post-office address.
† If a member of a firm, state the fact.
‡ State for or upon what the tax was assessed or the stamps affixed.

funded for the following reasons, viz: Because the assessment of said tax on said corporation was illegal and its collection was illegal.

And this deponent now claims that, by reason of the pay-
13 ment of the said sum of ($2,609.02) two thousand six hundred and nine 02/100 dollars, the said corporation is justly entitled to have the sum of ($2,609.02) two thousand six hundred and nine 02/100 dollars refunded, and it now asks and demands the same.

And this deponent further affirms that the said claimant is not indebted to the United States in any amount whatever, and that no claim has heretofore been presented for the refunding of the above amount, or any part thereof.§

WM. BIDDLE, *Treasurer.*

Affirmed and subscribed before me this 26th day of May, A. D. 1911.

ALLEN B. CLEMENT,
Notary Public.

Commission expires January 16th, 1913.

"Deputy Collector's Affidavit.

"I, ————, Deputy Collector, ———— Division, ———— District, being duly sworn according to law, depose and say, that I have personally investigated the statements made in the within affidavit,* ———— and from the best information I can obtain, after careful inquiry, I believe such statements to be in all respects just and true.

"This claim was received by me ———, 190 .

"———— ————,
"*Deputy Collector,*
"———— *Division,* ———— *District.*

"Sworn to and subscribed before me this ———— day of ————, A. D. 190 .

14 "Certificate of Examination of Records in Office of Commissioner of Internal Revenue.

"I hereby certify that, from present personal examination, I find the sum of ———— dollars and ———— cents reported against the said ———— ———— as ——— on ———— on page ———, line ——— of the list on Form ——— for ————————, ———; also the sum of ——— dollars and ——— cents reported against ———— as ——— on ——— on page ———, line ——— of the list on Form ——— for ————————, ——, now on file in the office of the Commissioner of Internal Revenue; and that

§ If a claim has been presented before, state the fact in lieu of this.
* See instructions in series 7, No. 14, revised, page 18.

the tax ——— included in the collector's aggregate receipt for the said list on file in this office. Said receipt amount to $—— and $——, respectively.

"Dated ———, 190 .

"———,
"Clerk Internal Revenue Office."

"Collector's Certificate.

"I hereby certify that I have carefully investigated the matters set forth in the within affidavit of ——— and am satisfied that the statements made by ——— are in all respects just and true, except ———.

"I further certify that I find, upon personal examination of the lists now on file in my office, assessments as follows:

Name.	Article.	List.	Page.	Line.	Amount.	Paid by—	Date of payment.

13 Of the above amounts, $——— and $——— are included in the aggregate receipts for the lists, amounting to $——— and $———, respectively.

I further certify that this claim was received by me ———, 190 , and that no claim for the refunding of any of the above assessments has heretofore been presented, and that no portion of the amount claimed was paid on a compromise or abated as uncollectible or erroneous."

———,
Collector.

Dated ———, 190 .

———, District.

Instructions in Regard to Preparation of Claim.

No. 1. All blank spaces provided in the claim, on page 1, and in the deputy collector's certificate and collector's certificates, on pages 2 and 4, must be properly filled. The collector's certificate, on page 2, must be signed by the collector, acting collector, or deputy collector in charge in all cases. The certificate on page 4 should be signed only in cases where the claim is for amounts paid for stamps.

† If the claim has been presented before, or if the amount was paid on a compromise or abated, the fact should be stated.

When two or more assessments are referred to in the claim, the page, line, and item of each and every assessment should be given as indicated in the above certificates.

No. 2. Certificates of purchase of stamps should include all stamps referred to in the claim; also payments of all special taxes upon kinds of business mentioned, liable thereto, and when paid in duplicate.

No. 3. Affidavits must be properly attested by someone having authority therefor. Any person other than an internal-revenue officer administering an oath or affirmation must show by seal or certificate from the proper authority that he is qualified to do so. Affidavits may be made before any internal-revenue officer authorized to administer oaths, without fee. An officer in signing a jurat should give the title of his office.

16

No. 4. In claims arising on account of special-tax stamps it is not sufficient to state that the claimants have done no business for which they would be liable to special tax. Affidavits should be furnished containing special denial as to each and all of the acts involving liability to special tax, as found in the statute imposing the tax; for instance, in the case of a retail liquor dealer: That from _____ _____ to _____ he neither "sold nor offered for sale any foreign or domestic distilled spirits, wines, or malt liquors in less quantities than five wine gallons at the same time."

No. 5. In cases where two special-tax stamps of the same kind have been issued for the same period and place to the same person or firm, an affidavit as above should be furnished, adding thereto the words, "except in one place (or more, as the case may be) for which he ha paid the special tax required by law."

No. 6. Where, in case of dissolution of a firm which had paid special tax, the remaining partner or partners have been required to pay new special tax for the unexpired portion of the time for which tax was paid by the original firm, and claim the refunding of the tax paid, it should be established that from _____ to _____, the successor carried on the same business as the original firm, and that during such period no person, not a member of the original firm, was taken into partnership.

17

No. 7. If the period for which the stamp was issued has expired, the affidavit furnished under instructions Nos. 4 and 6 should cover the whole period. If the period has not expired, the affidavit should cover the period from the first day of the first month for which the stamp was issued to the time of making the affidavit.

No. 8. A claim for refunding should be made in the name of the party assessed, if living; if he is dead there should be evidence of his death, and the claim should be made in the name of the executor or administrator. Certified copies of the letters of administration or letters testamentary, or other similar evidence, should be annexed to the claim to show that the claimant is administrator, etc.

The affidavit may be made by an agent of the party assessed; but in such case there should be evidence of the agency and of the sources of the agent's knowledge concerning the case in question.

When a firm is the claimant the claim should be in the name of the firm; but a member of the firm should swear to the facts set forth, including that of membership, and should subscribe his individual name. The artificial person, to wit, the firm, can not make oath.

No. 9. When a claim for refunding is made on the ground of a duplicate assessment and payment, the collector will certify to the duplicate assessment and payment on Form 46, giving the full amount both of the assessment and of the payment, and will also give the page, list, and line in each case.

The collector will, in all cases, insert in his certificate the full amount of the assessment and not simply the amount claimed.

No. 10. With each claim for the refunding of money paid for tax-paid spirit stamps purchased to replace lost stamps (which claims should be made on Form 46), there should be filed a statement showing the serial numbers of the lost stamps and the serial
18 numbers of the stamps which replace them, the serial numbers of the packages for which the lost stamps were purchased, and the fact that the new stamps were attached to said packages, and the date of purchase of each lot of stamps. Evidence should also be filed showing in whose possession the lost stamps were at the time of the loss, the manner of loss and circumstances connected therewith, and the efforts made to recover the stamps. A bond should also be filed with each claim, in double the amount claimed, with two or more sureties approved by the collector, indemnifying the United States against loss in case the missing stamps should be used. A form of bond for such cases has been prepared and will be furnished to collectors on application.

Claims for Sums Recovered by Suit.

No. 11. Claims for sums of money recovered by suit for any of the causes and against any of the officers enumerated in section 3220, Revised Statutes, should be made upon Form 46. The claimant should state the grounds of his claim under oath, giving the names of all the parties to the suit, the cause of action, date of its commencement, the date of the judgment, court in which it was recovered, and its amount. To this affidavit there should be annexed a duly certified copy of the record and judgment of the court in the case, a certificate of probable cause, and a receipt for all cost, acknowledging payment in full, duly signed by the clerk of the court.

Collector's Certificate as to Purchase of Stamps.

(Other than Special Tax.)

I hereby certify that it appears from the records of my office that the stamp referred to in the within claim w purchased as follows:

19 Date of purchase.	By whom purchased.	Kind of stamps.	Denomination.	Number.	Amount paid.

Special-Tax Stamps.

(In connection with which penalties have been assessed.)

Date of issue.	Kind of stamp.	Serial numbers.	To whom issued.	For period commencing—	Place of business: Locality, street, and number.	Amount paid.

Dated ——, 190 . ——— ———,

Collector, ——— *District*, ———.

(See instruction No. 1, page 3.)

U. S. Internal Revenue.

(Claim for refunding taxes collected.)

Allowed number, ----------

Rejected number, ----------

Claimant.

Address, ----------

----------, Collector,

----------District of----------

Nature of tax, ----------

Basis of claim, ----------

Amount claimed, $----------

Amount allowed, $----------

Amount rejected, $----------

Examined and submitted for ----------

--------, 190 , by ----------

Chief Claims Division.

No. ----------

20 EXHIBIT D.

Claim under Series 7, No. 14, revised, and Series 7, No. 27, Supplement No. 1, for taxes improperly paid or refundable under remedial statutes and for amounts paid for stamps used in error or excess.

U. S. Internal Revenue.

STATE OF PENNSYLVANIA,
County of Philadelphia, ss:

William Biddle, of the* city of Philadelphia and State and county aforesaid, being duly affirmed according to law, deposes and says that† he is treasurer of the Minehill & Schuylkill Haven Railroad Company, a corporation authorized to engage in but not actually engaged in the business of carrying freight and passengers for hire; that upon 29th day of second month (February), A. D. 1911, it was assessed a special excise internal-revenue tax of two thousand four hundred six and 21/100 dollars‡ with respect to the carrying on or doing business by said corporation during the year 1910, under the act of Congress of August 5, 1909, which amount he afterwards, on the 28th day of sixth month (June), A. D. 1911, paid to William McCoach, Esq., collector of internal revenue for the first district of Pennsylvania, and which amount, as this deponent verily believes, should be refunded for the following reasons, viz, because the assessment of said tax on said corporation was illegal, and its collection was illegal.

And this deponent now claims that, by reason of the pay-
21 ment of the said sum of ($2,406 21/100) two thousand four hundred six and 21/100 dollars, the said corporation is justly entitled to have the sum of two thousand four hundred six and 21/100 dollars refunded, and it now asks and demands the same.

And this deponent further makes affirmation that the said claimant is not indebted to the United States in any amount whatever, and that no claim has heretofore been presented for the refunding of the above amount, or any part thereof.§

WM. BIDDLE, *Treasurer.*

Affirmed and subscribed before me this 28th day of June, A. D. 1911.

ALLEN B. CLEMENT,
Notary Public.

Deputy collector's affidavit.

I, ———, deputy collector, ——— division, ——— district, being duly sworn according to law, depose and say that I have personally

* Give post-office address.
† If a member of a firm, state the fact.
‡ State for or upon what the tax was assessed or the stamps affixed.
§ If a claim has been presented before, state the fact in lieu of this.

investigated the statements made in the within affidavit,* ——— and from the best information I can obtain, after careful inquiry, I believe such statements to be in all respects just and true.

This claim was received by me ———, 190 .

———— ————,

Deputy Collector, ——— *Division,* ——— *District.*

Sworn to and subscribed before me this ——— day of ———, A. D. 190 .

22 Certificate of examination of records in office of Commissioner of Internal Revenue.

I hereby certify that, from present personal examination, I find the sum of ———— dollars and ———— cents reported against the said ———— as ——— on ———— on page ———, line ———, of the list on form ——— for ————, ———; also the sum of ——— dollars and ——— cents reported against ————, as ——— on ——— on page ———, line ——— of the list on form ——— for ————, ———, now on file in the office of the Commissioner of Internal Revenue; and that the tax ——— included in the collector's aggregate receipt for the said list on file in this office. Said receipt amount to $——— and $———, respectively.

Dated, ————, 190 .

———— ————,

Clerk Internal Revenue Office.

Collector's Certificate.

I hereby certify that I have carefully investigated the matters set forth in the within affidavit of ———— and am satisfied that the statements made by ——— are in all respects just and true, except ————.

I further certify that I find, upon personal examination of the lists now on file in my office, assessments as follows:

Name.	Article.	List.	Page.	Line.	Amount.	Paid to—	Date of payment.

23 Of the above amounts, $——— and $——— are included in the aggregate receipts for the lists, amounting to $——— and $———, respectively.

* See instructions in series 7, No. 14, revised, page 18.

I further certify that this claim was received by me ———, 190 , and that no claim for the refunding of any of the above assessments has heretofore been presented, and that no portion of the amount claimed was paid on a compromise or abated as uncollectible or erroneous.†

Dated ———, 190 .

———— ————,

Collector ——— *District*, ———.

Instructions in Regard to Preparation of Claim.

No. 1. All blank spaces provided in the claim, on page 1, and in the deputy collector's certificate and collector's certificates, on pages 2 and 4, must be properly filled. The collector's certificate, on page 2, must be signed by the collector, acting collector, or deputy collector in charge in all cases. The certificate on page 4 should be signed only in cases where the claim is for amounts paid for stamps.

No. 2. Certificates of purchase of stamps should include all stamps referred to in the claim; also payments of all special taxes upon kinds of business mentioned, liable thereto, and when paid in duplicate.

No. 3. Affidavits must be properly attested by some one having authority therefor. Any person other than an internal-revenue officer administering an oath or affirmation must show by seal or certificate, from the proper authority, that he is qualified to do so. Affidavits may be made before any internal-revenue officer authorized to administer oaths, without fee. An officer in signing a jurat should give the title of his office.

24

No. 4. In claims arising on account of special-tax stamps it is not sufficient to state that the claimants have done no business for which they would be liable to special tax. Affidavits should be furnished containing special denial as to each and all of the acts involving liability to special tax, as found in the statute imposing the tax; for instance, in the case of a retail liquor dealer: That from ———— ——— to ——— he neither "sold nor offered for sale any foreign or domestic distilled spirits, wines, or malt liquors in less quantities than five wine gallons at the same time," ———.

No. 5. In cases where two special-tax stamps of the same kind have been issued for the same period and place to the same person or firm, an affidavit as above should be furnished, adding thereto the words "except in one place (or more, as the case may be) for which he ha paid the special tax required by law."

No. 6. Where, in case of dissolution of a firm which had paid special tax, the remaining partner or partners have been required to pay new special tax for the unexpired portion of the time for which tax was paid by the original firm, and claim the refunding of the tax

† If the claim has been presented before, or if the amount was paid on a compromise or abated, the fact should be stated.
When two or more assessments are referred to in the claim, the page, line, and form of each and every assessment should be given as indicated in the above certificates.

paid, it should be established that from ——— ——— to ———, the successor carried on the same business as the original firm, and that during such period no person, not a member of the original firm, was taken into partnership.

No. 7. If the period for which the stamp was issued has ex-
25 pired, the affidavit furnished under instructions Nos. 4 and 6 should cover the whole period. If the period has not expired, the affidavit should cover the period from the first day of the first month for which the stamp was issued to the time of making the affidavit.

No. 8. A claim for refunding should be made in the name of the party assessed, if living; if he is dead, there should be evidence of his death, and the claim should be made in the name of the executor or administrator. Certified copies of the letters of administration or letters testamentary, or other similar evidence, should be annexed to the claim to show that the claimant is administrator, etc.

The affidavit may be made by an agent of the party assessed; but, in such a case, there should be evidence of the agency, and of the sources of the agent's knowledge concerning the case in question.

When a firm is the claimant, the claim should be in the name of the firm; but a member of the firm should swear to the facts set forth, including that of membership, and should subscribe his individual name. The artificial person, to wit, the firm, can not make oath.

No. 9. When a claim for refunding is made on the ground of a duplicate assessment and payment, the collector will certify to the duplicate assessment and payment on Form 46, giving the full amount both of the assessment and of the payment, and will also give the page, list, and line, in each case.

The collector will, in all cases, insert in his certificate the full amount of the assessment, and not simply the amount claimed.

No. 10. With each claim for the refunding of money paid for tax-paid spirit stamps purchased to replace lost stamps (which claims should be made on Form 46), there should be filed a state-
ment showing the serial numbers of the lost stamps, and the
26 serial numbers of the stamps which replace them, the serial numbers of the packages for which the lost stamps were purchased, and the fact that the new stamps were attached to said packages, and the date of purchase of each lot of stamps. Evidence should also be filed showing in whose possession the lost stamps were at the time of the loss, the manner of loss, and circumstances connected therewith, and the efforts made to recover the stamps. A bond should also be filed with each claim, in double the amount claimed, with two or more sureties approved by the collector, indemnifying the United States against loss in case the missing stamps should be used. A form of bond for such cases has been prepared, and will be furnished to collectors on application.

Claims for Sums Recovered by Suit.

No. 11. Claims for sums of money recovered by suit for any of the causes, and against any of the officers, enumerated in section 3220, Revised Statutes, should be made upon Form 46. The claimant should state the grounds of his claim under oath, giving the names of all the parties to the suit, the cause of action, date of its commencement, the date of the judgment, court in which it was recovered, and its amount. To this affidavit there should be annexed a duly certified copy of the record and judgment of the court in the case, a certificate of probable cause, and a receipt for all cost, acknowledging payment in full, duly signed by the clerk of the court.

Collector's Certificate as to Purchase of Stamps.

(Other than special tax.)

I hereby certify that it appears from the records of my office that the stamp referred to in the within claim w purchased as follows:

27 Date of purchase.	By whom purchased.	Kind of stamps.	Denomination.	Number.	Amount paid.		

Special-Tax Stamps.

(In connection with which penalties have been assessed.)

Date of issue.	Kind of stamps.	Serial numbers.	To whom issued.	For period commencing—	Place of business: Locality, street, and number.	Amount paid.		

Dated ———, 190 .

———— ————,

Collector, ——— *District,* ———.

(See Instruction No. 1, page 3.)

U. S. Internal Revenue.

Claim for Refunding Taxes Collected.

Allowed number, _____
Rejected number, _____
_____
Claimant.
Address, _____
_____, Collector,
_____ District of _____
Nature of tax, _____
Basis of claim, _____
Amount claimed, $_____
Amount allowed, $_____
Amount rejected, $_____
Examined and submitted for _____
_____, 190 , by_____
Chief Claims Division.
No. _____

28 EXHIBIT E.

"PHILADELPHIA, PA., *June 21, 1911.*

"MINE HILL & SCHUYLKILL HAVEN RAILROAD COMPANY,
"*119 S. Fourth Street, Philadelphia.*

"SIRS: Your claim for the refunding of $2,609.02 special excise tax for 1909 has been examined and rejected by the Commissioner of Internal Revenue, who advises me as follows:

"'The claim of the Mine Hill & Schuylkill Haven R. R. Co. of Philadelphia for the refunding of $2,609.02, special excise tax for 1909, has been examined.

"'This claim is based upon the contention that since the company has leased all its properties to the Philadelphia & Reading R. R. Co., it is not engaged in business for profit and is exempt from taxation under section 38, act of August 5, 1909.

"'It appears, however, that under the terms of the lease the claimant corporation guarantees its own perpetuity and the exercise of those functions to the use of which it is privileged under its charter. It receives an annual rental in a fixed sum sufficient to guarantee a reasonable dividend on its capital stock; it preserves the right and power of taking back for operation its own properties unimpaired whenever the leasing corporation shall violate the covenant and agreements. In addition to these corporate activities, to which it is pledged by the terms of the lease, an affidavit with the claim shows that it receives considerable sums annually as interest on deposits and on its contingent fund—evidence of business carried on independently for profit.

"'In the case of Flint v. Stone-Tracy Company, the Supreme Court said: "We think it is clear that corporations organized

Exhibit G.

Agreement between the Mine Hill and Schuylkill Haven R. R. Co. and the Philadelphia and Reading Railway Co. made the thirty-first day of December, 1896.

Whereas the railroads of the Mine Hill and Schuylkill
31 Haven Railroad Company and the railroads of the Philadelphia and Reading Railway Company are connected with each other, and the said companies, in pursuance of the act of assembly in such case made and provided, and of every other power and authority, them in that respect enabling, have agreed that the railroads of the said Mine Hill and Schuylkill Haven Railroad Company shall be leased to the Philadelphia and Reading Railway Company, and shall be run, used, and operated by the latter company upon the terms and conditions hereinafter set forth:

Now this indenture, made the thirty-first day of December, in the year of our Lord one thousand eight hundred and ninety-six, by and between the Mine Hill and Schuylkill Haven Railroad Company, hereinafter called the Mine Hill Company, of the first part, and the Philadelphia and Reading Railway Company, hereinafter called the Railway Company, of the second part, witnesseth:

That for and in consideration of the covenants and agreements of the Railway Company, hereinafter contained, and of the sum of one dollar, to it in hand paid by the Railway Company, the receipt whereof is hereby acknowledged, the Mine Hill Company hath let and demised, and by these presents doth let and demise unto the Railway Company, its successors and assigns, the entire railroad of the Mine Hill and Schuylkill Haven Railroad Company, from its junction with the Philadelphia and Reading Railway at Schuylkill Haven, in the county of Schuylkill, to its terminus at Taylor Colliery Branch Switch, near Ashland, in the county of Schuylkill, and its connection with the Mahanoy and Shamokin Railroad, at Enterprise Junction, in the county of Northumberland, including the West West Branch, Muddy Branch, Tremont Branch, Glendower Branch, Richardson Branch, Thomaston Branch, Laurel Run Branch, Oak
32 Hill Branch, Wolf Creek Branch, Swatara Branch, Middle Creek Branch, Mt. Eagle Branch, Taylor Colliery Branch, East Colliery Branch, Locust Spring Colliery Branch, Locust Gap Colliery Branch, being seventy-one and ninety one-hundredths miles in length, of which twenty-five and ninety-six one-hundredths miles are double track, and embracing, with its sidings, one hundred and forty-five and seventy-eight one-hundredths miles of single track railroad.

Together with all the sidings, tracks, and extensions, as now located and constructed, or as the same may hereafter be located and constructed, during the term of this demise, in pursuance of any lawful authority now existing, or which may hereafter exist, including the railroad formerly of the Schuylkill Haven and Lehigh River Railroad Company, and the Mt. Eagle and Tremont Railroad Company,

now merged, or intended to be merged, into and consolidated with the Mine Hill Company; also the railroads, branches, laterals, extensions, sidings, turnouts, tracks, bridges, viaducts, culverts, telegraph lines, posts, and wires, rights of way, water rights and privileges; all machinery, fixtures, depots, railroad stations, water stations, houses, buildings, structures, improvements, appurtenances, tenements, and hereditaments of whatever kind or description, held or owned by the Mine Hill Company; also all the engines, locomotives, cars, tenders, trucks, and all other rolling stock, tools, implements, machines, and personal property of every kind and description in use or adopted for use in, upon, or about the said railroad or the business thereof; also all lands, buildings, or improvements erected thereon, whether required for railroad purposes or not (excepting and excluding, however, all the property included in the schedule hereto annexed, marked schedule "A," which it is not intended hereby to lease or in any
33 manner affect), and also all the rights, powers, franchises (other than the franchise of being a corporation), and privileges which may now, or at any time hereafter during the time hereby demised, be lawfully exercised or enjoyed in or about the use, management, maintenance, renewal, extension, alteration, or improvement of the demised premises, or any of them. And the said Mine Hill Company doth hereby also assign and set over unto the railroad company all leases and other contracts made by it with other railroad companies or individuals, made or intended for enlarging the traffic and business of said railroad and facilitating the conduct thereof.

To have and to hold the said demised premises unto the railway company, its successors and assigns, for the full term of nine hundred and ninety-nine years, from and including the first day of January, 1897.

And in consideration of the premises, the said Mine Hill Company and the said railway company, parties thereto, do hereby covenant and agree as follows (each covenanting for itself, its successors and assigns, with the other, its successors and assigns):

First. That the railway company shall and will well and truly pay, or cause to be paid, on the dates hereinafter specified, during the said term, as rent for the said demised premises, the following sums of money:

The yearly rental of two hundred and fifty-two thousand six hundred and twelve dollars ($252,612), which is equivalent to six per centum on the present capital stock of the said Mine Hill Company, which said rental is to be paid in equal half-yearly payments, on the first day of January and July in each year. The railway company shall also pay all taxes and assessments that may be legally
34 levied or assessed upon the premises or property hereby demised, or intended so to be, or any part thereof, and all taxes or assessments which are or may be due and payable for or on account of any business done upon said road or demised property, but not any tax or charge that is or may be levied or assessed upon the said yearly rent herein covenanted to be paid, the capital stock of the

said Mine Hill Company, or any dividends declared by the said Mine Hill Company.

Second. That the railway company shall and will during the hereby demised term, keep and maintain the said demised premises in good order and repair, except as hereinafter provided, keep in public use, maintain and efficiently operate the same, and from time to time, and at all times, save harmless the Mine Hill Company from all liabilities, damages, claims, and suits, by reason of anything done or omitted by the railway company in the premises, or which shall have heretofore been done or omitted by the Philadelphia and Reading Railroad Company, or the receivers thereof, in conducting the operation of the said railroad and premises; and the railway company shall at the expiration or other determination of the hereby demised term surrender the railroad and premises demised, which are of a fixed and permanent character, subject to the proviso and exception hereinafter set forth, in the same good order and condition as they are now, and shall pay to the Mine Hill Company the sum of one hundred and forty-eight thousand two hundred and twenty-two dollars and four cents ($148,222.04) in cash, being the balance of the appraised value of the personal property transferred by the Mine Hill Company to the Philadelphia and Reading Railroad Company under the lease of May 12th, 1864: Provided, however, That
35 nothing herein contained shall make it obligatory upon the railway company to keep or maintain in such good order and repair any portion of the said railroad, its branches, sidings, extensions, now or hereafter to be made, or any of the appurtenances thereof, extending to, or which are or may be from time to time used exclusively by any one colliery which is now or may hereafter be abandoned, or the working thereof may be discontinued, or which does not furnish and supply sufficient traffic to pay the needful repairs and expenses of the portion of said railroad leading to said colliery. And provided also, That the railway company shall not be required to keep, maintain, and operate the whole or any part of the railroad belonging to the Mine Hill Company north of Mine Hill, one of the chartered termini of said railroad, from and after the time when, in the judgment of the railway company, it is unprofitable and undesirable to use the same, and in such event the same may be abandoned by the railway company for and in behalf of the Mine Hill Company, whenever it shall be found legally practicable to abandon so much of the said lines of railroad, without working a forfeiture or any impairment of the chartered rights and franchises of the Mine Hill Company as to its railroads, or any part thereof, or without creating any liability on the part of the Mine Hill Company or the railway company, to the public or the Commonwealth, for the non user of such portion of the railroad lines. Whenever it shall be found legally practicable to cease the operation of any part or the whole of the said lines of railway north of Mine Hill, and the railway company shall exercise its option to discontinue said use, and to abandon the same, the rails, superstructures, and machinery and

appliances of every kind shall be sold at the best price obtainable for
the same, and the proceeds thereof paid to the Mine Hill
36 Company, to be by it invested in the purchase of its own
stock, which when so purchased, shall be canceled, and the rent diminished by the amount of dividend applicable to such surrendered stock. And provided further, That whenever any portion or portions of the said railroads hereby demised shall be found to pass over or in proximity to any workable vein or veins of iron ore, coal, or other mineral, so as to interfere with the ordinary method of mining the same, or with the safety of said road, then in every such case it shall be lawful for the railway company to re-locate the said railroad in such manner as it may deem best, as provided in the act of 11th of April, 1862; and it shall likewise be lawful for the railway company to widen, straighten or improve any portions of said railroad hereby demised, and whenever a portion of said railroad is re-located to accommodate mining, or to straighten and improve it, the new location shall be and become the property of the Mine Hill Company, and be subject to the terms of this agreement.

Third. The Mine Hill Company shall and will, during the term hereby demised, maintain its corporate existence and organization; and at all times, and from time to time, during the continuance of the said term, when requested by the railway company, its successors or assigns, shall and will put in force and exercise each and every corporate power, and do each and every corporate act which the Mine Hill Company might now, or may at any time hereafter, lawfully put in force or exercise to enable the railway company to enjoy, avail itself of, and exercise, every right, franchise and privilege in respect of the use, management, maintenance, renewal, extension,
tended so to be, and of the business to be there carried on, the
37 railway company agreeing to indemnify and save harmless the
Mine Hill Company against all loss, expense, damage, or liability for such exercise of corporate powers or performance of corporate acts, when exercised or done at the request of the railway company.

Fourth. The Mine Hill Company shall and will from time to time hereafter, during the continuance of the hereby demised term, upon the request, and at the charge, so far as the expense of the papers needful therefor, of the railway company, make, execute, and deliver unto the said railway company, all and every such further and other leases, deeds, transfers, and agreements as by the said railway company shall be reasonably desired or required for fully granting and confirming unto the said railway company the railroads and premises and rights hereinbefore mentioned and leased, or intended or agreed so to be, and for more fully confirming, granting, and securing unto the said railway company all the rights and privileges herein mentioned, granted, and secured, or intended so to be.

Fifth. The railway company shall procure a transfer and assignment from Charles Henry Coster and Francis Lynde Stetson of all the right, title, interest, claim, and demand of the Philadelphia and Reading Railroad Company of, in, and to the leasehold of the Mine

Hill Railroad heretofore made, on the twelfth day of May, 1864, between the Mine Hill Railroad Company and the Philadelphia and Reading Railroad Company, and all interest or claims arising thereunder, acquired by them at the foreclosure sale of the Philadelphia and Reading Railroad Company, made in pursuance of the decree of the Circuit Court of the United States for the Eastern District
38 of Pennsylvania, No. 9, April session, 1895, which sale was duly confirmed and the deed therefor, dated the twenty-third day of October, 1896, was duly made and delivered by the Pennsylvania Company for insurances on lives and granting annuities, trustee, to the said Charles Henry Coster and Francis Lynde Stetson, as by reference to the records of the said case will fully and at large appear; and this present indenture shall be and become the contract and lease, in lieu of and substitution for the said contract and lease, dated the twelfth day of May, 1854, as aforesaid.

Sixth. That if the railway Company shall make default in the payment of the rent hereby reserved, or in any of the payments herein covenanted to be made by it, for a period of thirty days after the same shall have become due and shall have been demanded from it in writing by the Mine Hill Company, or shall fail to keep harmless the Mine Hill Company, as herein covenanted, after notice, it shall and may be lawful for the Mine Hill Company to declare this lease forfeited and at an end, and to reenter and repossess the whole of the demised premises as of its first and former estate; but such reentry and repossession shall not relieve the railway company from liability to the Mine Hill Company, its successors or assigns, for all arrears of rent due and unpaid at the time, and for all damages resulting from the breach or breaches of covenant by the railway company.

Seventh. All the covenants herein contained shall extend to and bind as covenants running with the land the successors and assigns of the respective parties hereto.

In witness whereof, the parties hereto have caused their corporate seals to be hereunto affixed, duly attested by the signatures of
39 their respective presidents and secretaries, the day and year aforesaid.

THE MINE HILL AND SCHUYLKILL HAVEN RAILROAD COMPANY,
By BENJAMIN H. SHOEMAKER, *President.* [L. S.]

Attest:

JAMES G. McCOLLIN,
Secretary.

PHILADELPHIA AND READING RAILWAY COMPANY,
By J. S. HARRIS, *President.* [L. S.]

Attest:

W. R. TAYLOR,
Secretary.

Sealed and delivered in the presence of W. R. Taylor, Jas. G. McCollin.

STATE OF PENNSYLVANIA, CITY AND COUNTY OF PHILADELPHIA, *ss:*

Be it remembered that on the fourth day of January, A. D. 1897, before me, the subscriber, a notary public in and for the said county and State, personally appeared James G. McCollin, who, being duly affirmed according to law, deposed and said that he is the secretary of the Mine Hill and Schuylkill Haven Railroad Company, the corporation named in the above and foregoing indenture of lease; that he was personally present at the execution of the said indenture of lease and saw the corporate seal of the said company affixed thereto; that Benjamin H. Shoemaker, the president of the said com-
40 pany, did then sign, seal, and deliver the said indenture of lease as the act and deed of the said company, by virtue of the authority vested in him as such president, and desire that the said indenture of lease might be recorded as such act and deed; that the seal so affixed is the common or corporate seal of the said company; that he, the deponent, at the same time signed his name to the said indenture of lease as a subscribing witness thereto and as said secretary, in attestation of the due execution and delivery thereof; and that the names of the said president and of this deponent, subscribed to the said indenture of lease as aforesaid are of their own proper and respective handwriting.

JAS. G. McCOLLIN.

Affirmed to and subscribed before me the day and year first aforesaid. Witness my hand and notarial seal.

[L. S.] H. F. REARDON,
Notary Public.

STATE OF PENNSYLVANIA, CITY AND COUNTY OF PHILADELPHIA, *ss:*

Be it remembered that on the fourth day of January, A. D. 1897, before me, the subscriber, a notary public in and for the said county and State, personally appeared Benjamin H. Shoemaker, who, being duly affirmed according to law, deposed and said that he is the president of the Mine Hill and Schuylkill Haven Railroad Company, the corporation named in the above and foregoing indenture of lease; that he was personally present at the execution of the said indenture of lease and did affix the common or corporate seal of the said corporation thereto; and that the seal so affixed is the common or corporate seal of the said company; and that the foregoing
41 indenture of lease was duly sealed and delivered as and for the act and deed of the said Mine Hill and Schuylkill Haven Railroad Company, and that the signature of this deponent to the said indenture of lease, as president of the said corporation, is of this deponent's own proper handwriting.

BENJ. H. SHOEMAKER.

Affirmed to and subscribed before me, the day and year first aforesaid. Witness my hand and notarial seal.

[L. S.] H. F. REARDON,
Notary Public.

STATE OF PENNSYLVANIA, CITY AND COUNTY OF PHILADELPHIA, *ss:*

Be it remembered, That on the thirty-first day of December, A. D. 1896, before me, the subscriber, a notary public in and for the said county and State, personally appeared W. R. Taylor, who, being duly sworn according to law, deposed and said that he is the secretary of the Philadelphia and Reading Railway Company, the corporation named in the above and foregoing indenture of lease, and that he was personally present at the execution of the said indenture of lease, and saw the corporate seal of the said company affixed thereto; that J. S. Harris, the president of the said company, did then sign, seal, and deliver the said indenture of lease, as the act and deed of the said company, by virtue of the authority vested in him as such president, and desire that the said indenture of lease might be recorded as such act and deed; that the seal so affixed is the common or corporate seal of the said company; that he, the deponent, at the same time, signed his
42 name to the said indenture of lease, as a subscribing witness thereto, and as said secretary, in attestation of the due execution and delivery thereof; and that the names of the said president and of this deponent, subscribed to the said indenture of lease as aforesaid, are of their own proper and respective handwriting.

W. R. TAYLOR.

Sworn to and subscribed before me, the day and year first aforesaid. Witness my hand and notarial seal.

[L. S.]

C. K. KLINK,
Notary Public.

STATE OF PENNSYLVANIA, CITY AND COUNTY OF PHILADELPHIA, *ss:*

Be it remembered, That on the thirty-first day of December, A. D. 1896, before me, the subscriber, a notary public in and for the said county and State, personally appeared J. S. Harris, who, being duly sworn according to law, deposed and said that he is the president of the Philadelphia and Reading Railway Company, the corporation named in the above and foregoing indenture of lease; that he was personally present at the execution of the said indenture of lease, and did affix the common or corporate seal of the said corporation thereto, and that the seal so affixed is the common or corporate seal of the said company; and that the foregoing indenture of lease was duly sealed and delivered as and for the act and deed of the said Philadelphia and Reading Railway Company, and that the signature of this deponent to the said indenture of lease, as president of the said corporation, is of this deponent's own proper handwriting.

J. S. HARRIS.

43 Sworn to and subscribed before me, the day and year first aforesaid. Witness my hand and notarial seal.

[L. S.]

C. K. KLINK,
Notary Public.

(Endorsed:) No. 4094. C. P. No. 4. June term, 1911. Mine Hill and Schuylkill Haven R. R. Co. *v.* Wm. McCoach. (P. O. Bldg.) Statement of plaintiff's claim. (Copy.) Enter rule on above defendant to file an affidavit of defense within fifteen days, or judgment sec. reg. G. W. Pepper, Eli Kirk Price, per L. Attys. for plaintiff. To Prothy. C. C. P. Filed Aug. 1, 1911. Pro Prothy. G. W. Pepper, Eli Kirk Price.)

AFFIDAVIT OF SERVICE OF STATEMENT.

(Filed August 14, 1911.)

William Leedom, being sworn according to law, deposes and says that on the 3d day of August, 1911, he duly served upon William McCoach, above-named defendant, a copy of plaintiff's statement filed in above case, with a notice endorsed thereon that a rule had been entered on the defendant to file an affidavit of defence in fifteen (15) days or judgment sec. reg., by handing same to him personally in the county of Philadelphia, State of Pennsylvania.

WILLIAM LEEDOM.

Sworn and subscribed before me this 12th day of August, A. D. 1911.

[SEAL.] FRANK J. MAGUIRE,
Notary Public.

My commission expires March 10, 1913.

44 WRIT OF CERTIORARI.

(Filed September 21, 1911.)

UNITED STATES OF AMERICA, EASTERN DISTRICT OF PENNSYLVANIA, *sct:*

The President of the United States to the honorable the judges of the Court of Common Pleas No. 4 of Philadelphia County, Pennsylvania, greeting:

Whereas, lately in your said court, suit by way of summons in assumpsit was commenced by the Minehill & Schuylkill Haven Railroad Company against William McCoach, collector of internal revenue for the first collection district of Pennsylvania, said suit being No. 4094, of June term, 1911, which said suit, as it is said, is still pending before you in the said Court of Common Pleas No. 4, of Philadelphia County, Pennsylvania, undetermined; and whereas on the application of the said William McCoach to the Circuit Court of the United States for the Eastern District of Pennsylvania, in the third circuit, on a suggestion supported by proper evidence, that the said suit was brought on account of an act done by him, under color of his office, as collector of internal revenue, as aforesaid, the said suit having been brought to recover certain moneys paid by the said plaintiff to the said William McCoach, collector of internal revenue

as aforesaid, for internal revenue taxes claimed to be due and owing from the said plaintiff to the United States of America, and praying that a writ of certiorari may be immediately issued by the clerk of said Circuit Court of the United States, directed to the said Court of Common Pleas No. 4, of Philadelphia County, Pa., to send to
45 the said Circuit Court of the United States the record and proceedings in the said cause, according to the provisions of the act of Congress in such case made and provided.

Wherefore, you are hereby commanded to transmit, under your seal, the record and proceedings of the said suit, with all things thereunto relating, unto the said Circuit Court of the United States, to be holden at Philadelphia, for the eastern district of Pennsylvania, in the third circuit, on the first Monday of September, plainly and distinctly, in as full and ample manner as it now remains before you, together with this writ, so that the said Circuit Court of the United States may be able therein to proceed and do what shall appear of right ought to be done.

Witness, the honorable Edward D. White, Chief Justice of the Supreme Court of the United States, at Philadelphia, this 8th day of August, A. D. 1911, and in the 136th year of the Independence of the United States.

[SEAL.] LEO. A. LILLY,
Deputy Clerk of Circuit Court, U. S.

(Endorsed:)

To the honorable the judges of the Circuit Court of the United States for the Eastern District of Pennsylvania.

The record and process and all things touching the same, so full and entire as before us they remain, we certify and send, as within we are commanded.

[SEAL.] CHAS. Y. AUDENRIED,
Judge, C. of C. P. No. 4, Phila.

46 *Affidavit of defense.*

UNITED STATES OF AMERICA, EASTERN DISTRICT OF PENNSYLVANIA, *ss:*

William McCoach, having been duly sworn according to law, deposes and says that he is the defendant in the above-entitled action, and was during the years 1909, 1910, and 1911, up to the present time, collector of internal revenue for the first collection district of Pennsylvania, and that the defendant has a lawful, just, and full defence to the whole of the amount claimed by the plaintiff in the above-entitled action of the following nature and character, to wit:

The plaintiff is a railroad corporation organized for profit, having a capital stock represented by shares, and engaged in business in the State of Pennsylvania.

That the said railroad company was organized and incorporated by virtue of an act of assembly of the State of Pennsylvania, approved

the twenty-fourth day of March, 1828, entitled "An act to incorporate the Mine Hill and Schuylkill Haven Railroad Company," and the several supplements thereto, and that under the act of assembly approved the eighth day of April, 1829, entitled "A supplement to an act entitled 'An act authorizing the governor to incorporate the Allegheny and Conewango Canal Company, and for other purposes,'" was authorized to make a lateral railroad.

That under the powers conferred upon it by the said acts of assembly it has laid out, constructed, and operated railroads for the carrying of freight and passengers for hire.

That under the general railroad laws of the State of Pennsylvania it is authorized to enter into contracts for the lease of its railroad, and, under the authority and by virtue of the power conferred by the said acts, made and entered into the agreement with
47 the Philadelphia & Reading Railway Company, set forth in plaintiff's statement of claim as Exhibit "G."

That the plaintiff corporation keeps and maintains an office for the transaction of its business at 119 South Fourth Street, in the city of Philadelphia, and did keep and maintain said office during the years 1909 and 1910.

That the plaintiff has continually, since the date of the agreement between the plaintiff and the Philadelphia & Reading Railway Company, made the thirty-first day of December, 1896, set forth in plaintiff's statement of claim as Exhibit G, maintained its corporate existence and organization by the annual election of a president and board of managers, and the said board of managers has annually, since the said date, elected a secretary and treasurer of the said corporation.

That, under the said agreement, the plaintiff is obliged during the term thereof to maintain its corporate existence and organization, and at all times and from time to time during the continuance of the said term, when requested by the Philadelphia & Reading Railway Company, to put in force and exercise each and every of its corporate powers and do each and every corporate act necessary to enable the Philadelphia & Reading Railway Company to enjoy, avail itself of, and exercise every right, franchise, and privilege in respect of the use, management, maintenance, renewal, extension, alteration, or improvement of the premises demised, and the business to be there carried on by the said Philadelphia & Reading Railway Company.

That the plaintiff, through its officers, receive annually from the Philadelphia & Reading Railway Company rental in a fixed sum sufficient to guarantee a reasonable dividend upon its capital stock.

48 That, under its agreement with the Philadelphia & Reading Railway Company, it preserves the right and power of taking back for operation its said property unimpaired whenever the Philadelphia & Reading Railway Company shall violate the covenants of said agreement.

That, through its officers, it receives annually sums of money as interest on deposits and maintains a contingent fund from which it also receives annual sums as dividends.

That the plaintiff, through its officers, made returns of its annual net income for the years ending December 31, 1909, and December 31, 1910, copies of which are hereto attached and marked Exhibits A and B.

That, as appears by the said returns, it did lay out and expend therefrom during the years aforesaid certain amounts for the ordinary and necessary expenses of the maintenance and operation of the business and properties of the corporation; that is to say, salaries of its officers and clerks and the expense of maintaining its office and keeping up the activities of its corporate existence.

That it has, during the years aforesaid, kept and maintained at its offices its stock books for the transfer of its capital stock; that during the said years its capital stock has been bought and sold upon the market, and the shares so bought and sold have been transferred upon its said stock books.

That the plaintiff, although it has leased its railroad and other property mentioned in the said agreement, has, therefore, never gone out of business in connection with its property, nor disqualified itself from any activity under its charter in respect thereto.

49 As to all of which facts, the deponent avers and believes they are true and expects to be able to prove the same on the trial of this case.

WM. McCOACH.

Sworn to and subscribed before me this 17th day of October, A. D. 1911.

[SEAL.] H. E. KELLER,
Deputy Clerk, District Court United States,
Eastern District of Pennsylvania.

STATE OF PENNSYLVANIA, COUNTY OF PHILADELPHIA, *to wit:*

Benjamin H. Shoemaker, president, and William Biddle, treasurer, of the Mine Hill and Schuylkill Haven Railroad Company, a corporation, whose amended return of annual net income for 1909 is filed herewith, being severally duly affirmed, each for himself, deposes and says that no revenue is derived by the corporation making said return from the carrying on, or doing business by said corporation, or from the operation and management of the business done on its railroad and property, all of which is under lease to the Philadelphia and Reading Railway Company for a term of 999 years from first month, 1st (January 1st), 1897, at a yearly rental of $252,612. In addition to said rental, the corporation has received during the year ending twelfth month, 31st (December 31st), 1909, interest on deposits and on its contingent fund amounting to $24,471.07, and

they request that this affidavit be attached to said return and considered a part thereof.

BENJAMIN H. SHOEMAKER,
President.
WM. BIDDLE, *Treasurer.*

Affirmed and subscribed to before me this 28th day of February, 1911.

ALLEN B. CLEMENT,
Notary Public.

50 EXHIBIT A.

Form No. 636.

Corrected return.

(To be filled in by collectors.) List No. 331. Class B1. 1st district of Pa. Date received ———, 191 .

(To be filled in by internal revenue bureau.) Assessment list, February, 1911. Page 155. Line 12. United States Internal Revenue.

Return of annual net income. (Section 38, act of Congress approved August 5, 1909.)

TRANSPORTATION CORPORATIONS.

Return of net income received during the year ending December 31, 1909, by Mine Hill and Schuylkill Haven Railroad Company, a corporation, the principal place of business of which is located at No. 119 South Fourth Street, city of Philadelphia, in the State of Pennsylvania.

1. Total amount of paid-up capital stock outstanding at close of year		$4,210,200.00
2. Total amount of bonded and other indebtedness outstanding at close of year		Nothing.
3. Gross income (see Note A)		277,083.07

DEDUCTIONS.

4. Total amount of all the ordinary and necessary expenses of maintenance and operation of the business and properties of the corporation exclusive of interest payments. (See Note B)	$5,809.33	
51 5. (a) Total amount of losses sustained January 1 to December 31 not compensated by insurance or otherwise	------	
(b) Total amount of depreciation January 1 to December 31	------	
6. Total amount of interest paid January 1 to December 31 on an amount of bonded and other indebtedness not exceeding the amount of paid-up capital stock outstanding at the close of the year	24,639.67	
7. (a) Total taxes paid January 1 to December 31 imposed under authority of the United States or any State or Territory thereof	------	
(b) Foreign taxes paid	------	

8. Amount received by way of dividends upon stock of other corporations, joint-stock companies, associations, and insurance companies subject to this tax	
Total deductions (see Note B)	$30,449.00
9. Net income	246,634.07
10. Specific deduction from net income allowed by law	5,000.00
11. Amount on which tax at 1 per centum is to be calculated for assessment	241,634.07

52 State of ——, county of ——, to wit:

——, president, and ——, treasurer, of the —— corporation, whose return of annual net income is set forth above, being severally duly sworn, each for himself, deposes and says that the foregoing report and the several items therein set forth are, to his best knowledge and belief and from such information as he has been able to obtain, true and correct in each and every particular; that the amount of gross income therein set forth is the full amount of gross income, without any deduction whatsoever, received from all sources by the said corporation during the year stated; and that the net income therein set forth is the full amount by which to measure the tax at 1 per centum for assessment.

—— ——,
President.

—— ——,
Treasurer.

Sworn and subscribed to before me this — day of ——, 191 .

—— ——,
——.
(Official capacity.)

[Seal of executive officer.]

NOTE A.—Gross income shall consist of the gross revenue derived from the operation and management of the business and property of the corporation making the return, together with all amounts of income (including dividends received on stock of other corporations, joint-stock companies, and associations subject to this tax) derived from all sources as shown by the entries on its books from January 1 to December 31 of the year for which return is made.

NOTE B.—The deductions authorized shall include all expense items
53 under the various heads acknowledged as liabilities by the corporation making the return and entered on its books from January 1 to December 31. Amounts of income expended in paying dividends on stock, preferred or common, or in making permanent improvements, in betterments, etc., or in any way transferred to capital account, are not proper deductions in ascertaining annual net income. Interest paid on mortgage indebtedness on real estate acquired by a corporation may be deducted in item 4, if the mortgage remains a lien on the property and the debt is not assumed by the corporation. The amount so paid and included in item 4 should, however, be separately stated under item 4.

NOTE C.—This form, properly filled out and executed, must be in the hands of the collector of internal revenue for the district in which is located the principal business office of the corporation making the return on or before March 1.

Form No. 636.

U. S. Internal Revenue.

Return of annual net income. (Sec. 38, act of Congress, August 5, 1909.)

TRANSPORTATION CORPORATIONS.

Return of net income received during the year ending December 31, 191 , by ————, a corporation, the principal place of business of which is located at ———————— in the State of ————.

First Collection District, State of Pennsylvania.

54 EXHIBIT B.

Form No. 636.

(To be filled in by collectors.) List No. 3853. Class B. 1st district of Pa. Date received, 2-28, 1911.

(To be filled in by internal-revenue bureau.) Assessment, list, February, 1911. Page 26. Line 16. United States internal revenue.

Return of annual net income. (Sec. 38, act of Congress, August 5, 1909.)

TRANSPORTATION CORPORATIONS.

Return of net income received during the year ending December 31, 1910, by Mine Hill and Schuylkill Haven Railroad Company, a corporation, the principal place of business of which is located at No. 119 South Fourth Street, city of Philadelphia, in the State of Pennsylvania.

1. Total amount of paid-up capital stock outstanding at close of year at par	$4,210,200.00
2. Total amount of bonded and other indebtedness outstanding at close of year	Nothing.
3. Gross income (see Note A) as defined in Note A	$277,494.74

No revenue is derived by the corporation making this return from the carrying on or doing business by said corporation or from the operation and management of the business done on its railroad and property, all of which is under lease to the Philadelphia and Reading Railway Company for a term of 999 years from first month 1st (January 1st), 1897, at a yearly rental of $252,612.

55 DEDUCTIONS.

4. Total amount of all the ordinary and necessary expenses of maintenance and operation of the business and properties of the corporation exclusive of interest payments. (See Note B)	$5,770.13
5. (*a*) Total amount of losses sustained January 1 to December 31 not compensated by insurance or otherwise	Nothing.
(*b*) Total amount of depreciation January 1 to December 31	Nothing.

6. Total amount of interest paid January 1 to December 31 on an amount of bonded and other indebtedness not exceeding the amount of paid-up capital stock outstanding at the close of the year	Nothing.	
7. (*a*) Total taxes paid January 1 to December 31 imposed under authority of the United States or any State or Territory thereof	$26,103.24	
(Tax on capital stock paid to the State of Pennsylvania.)		
(*b*) Foreign taxes paid	Nothing.	
8. Amount received by way of dividends upon stock of other corporations, joint-stock companies, associations, and insurance companies subject to this tax	Nothing.	
Total deductions (see Note B)		$31,873.37
9. Net income as defined in the act of Congress and regulations of the department		$245,621.37
10. Specific deduction from net income allowed by law		$5,000.00
11. Amount on which tax at 1 per centum is to be calculated for assessment		$240,621.37
Tax		$2,406.21

STATE OF PENNSYLVANIA, COUNTY OF PHILADELPHIA, *to wit:*

Benjamin H. Shoemaker, president, and William Biddle, treasurer, of the Mine Hill and Schuylkill Haven Railway Company, corporation, whose return of annual net income is set forth above, being severally duly affirmed, each for himself, deposes and says that the foregoing report and the several items therein set forth are, to his best knowledge and belief and from such information as he has been able to obtain, true and correct in each and every particular; that the amount of gross income therein set forth is the full amount of gross income, without any deduction whatsoever, received from all sources by the said corporation during the year stated, and that the net income therein set forth is the full amount by which to measure the tax at 1 per centum for assessment.

BENJ. H. SHOEMAKER, *President.*
WM. BIDDLE, *Treasurer.*

Affirmed and subscribed to before me this 20th day of February, 1911.

ALLEN B. CLEMENT,
Notary Public.
(Official capacity.)

Commission expires January 16, 1913.
[Seal of executing officer.]

57 NOTE A.—Gross income shall consist of the gross revenue derived from the operation and management of the business and property of the corporation making the return, together with all amounts of income (including dividends received on stock of other corporations, joint-stock companies, and associations subject to this tax) derived from all sources as shown by the entries on its books from January 1 to December 31 of the year for which return is made.

NOTE B.—The deductions authorized shall include all expense items under the various heads acknowledged as liabilities by the corporation making the

return and entered on its books from January 1 to December 31. Amounts of income expended in paying dividends on stock, preferred or common, or in making permanent improvements, in betterments, etc., or in any way transferred to capital account, are not proper deductions in ascertaining annual net income. Interest paid on mortgage indebtedness on real estate acquired by a corporation may be deducted in item 4, if the mortgage remains a lien on the property and the debt is not assumed by the corporation. The amount so paid and included in item 4 should, however, be separately stated under item 4.

NOTE C.—This form, properly filled out and executed, must be in the hands of the collector of internal revenue for the district in which is located the principal business office of the corporation making the return on or before March 1.

The return of Mine Hill and Schuylkill Haven R. R. Co. shown on the reverse side of this sheet was amended as shown in red ink, in accordance with the provisions of paragraph 4 of section 38, act of August 5, 1909.

_____ _____,
Commissioner.

(Dat.) August 7, 1911.
Approved:
By order of the secretary.

_____ _____,
Assistant Secretary.

58 Form No. 636.

U. S. Internal Revenue.

Return of annual net income. (Sec. 38, act of Congress, August 5, 1909.)

TRANSPORTATION CORPORATIONS.

Return of net income received during the year ending December 31, 191 , by _____, a corporation, the principal place of business of which is located at _____, in the State of _____.

First Collection District, State of Pennsylvania.

(Endorsed: No. 1494, April sessions, 1911. United States Circuit Court. The Mine Hill and Schuylkill Haven Railroad Company *v.* William McCoach. Affidavit of defence. J. Whitaker Thompson, U. S. Attorney.)

Rule for Judgment for Want of a Sufficient Affidavit of Defense.

Enter rule on defendant in above case to show cause why judgment should not be entered for want of a sufficient affidavit of defense.

G. W. PEPPER,
Per L. W. ROBEY.
Attorney for Plaintiff.
(October 31, 1911.)

To clerk U. S. Circuit Court.

59 *Order to Place Rule for Judgment upon Argument List.*

(Filed October 31, 1911.)

Please place rule for judgment for want of a sufficient affidavit of defense in the above case upon the argument list for November twenty-seventh, 1911.

G. W. PEPPER,
Per L. W. ROBEY,
Attorney for Plaintiff.

To clerk U. S. Circuit Court.

Opinion Making Absolute Rule for Judgment for Want of a Sufficient Affidavit of Defence.

(Filed January 2, 1912.)

McPHERSON, *District Judge.*

The only question presented by this rule is whether the plaintiff was actually "engaged in business" during the tax years of 1909 and 1910. If it was so engaged, it was subject to the corporation tax law of 1909, and the payments exacted for these years cannot be recovered. If it was not so engaged, the act of 1909 did not apply, and the payments should be refunded.

The business that the plaintiff was created to do was the construction and the operation of a railroad. The State of Pennsylvania gave it a charter in 1828 (P. L. 205), under which the road was built and for many years was operated. In 1896, however, the Philadelphia & Reading Railway Company leased the plaintiff's property and franchises for 999 years at a specified rent, and since that time the plaintiff has merely maintained a corporate existence, received the rents, and distributed them among its stockholders. In
60 substance, it did nothing else in 1909 and 1910, as will appear, I think, by the following quotation from the collector's affidavit of defense:

"That the plaintiff corporation keeps and maintains an office for the transaction of its business at 119 South Fourth Street, in the city of Philadelphia, and did keep and maintain said office during the years 1909 and 1910.

"That the plaintiff has continuously, since the date of the agreement between the plaintiff and the Philadelphia and Reading Railway Company made the thirty-first day of December, 1896, set forth in plaintiff's statement of claim as Exhibit G, maintained its corporate existence and organization by the annual election of a president and board of managers, and the said board of managers has annully since the said date elected a secretary and treasurer of the said corporation.

"That, under the said agreement, the plaintiff is obliged during the term thereof to maintain its corporate existence and organiza-

tion, and at all times and from time to time during the continuance of the said term, when requested by the Philadelphia & Reading Railway Company, to put in force and exercise each and every of its corporate powers and do each and every corporate act necessary to enable the Philadelphia & Reading Railway Company to enjoy, avial itself of, and exercise, every right, franchise, and privilege in respect of the use, management, maintenance, renewal, extension, alteration, or improvement of the premises demised, and the business be there carried on by the said Philadelphia & Reading Railway Company.

"That the plaintiff, through its officers, receives annually from the Philadelphia & Reading Railway Company rental in a fixed sum sufficient to guarantee a reasonable dividend upon its capital stock.

"That, under its agreement with the Philadelphia & Reading Railway Company, it preserves the right and power of taking
61 back for operation its said property unimpaired whenever the Philadelphia & Reading Railway Company shall violate the covenants of said agreement.

"That, through its officers, it receives annually sums of money as interest on deposits and maintains a contingent fund from which it also receives annual sums as dividends.

"That the plaintiff, through its officers, made returns of its annual net income for the years ending December 31, 1909, and December 31, 1910, copies of which are hereto attached and marked Exhibits A and B.

"That, as appears by the said returns, it did lay out and expend therefrom during the years aforesaid certain amounts for the ordinary and necessary expenses of the maintenance and operation of the business and properties of the corporation; that is to say, salaries of its officers and clerks, and the expense of maintaining its office and keeping up the activities of its corporate existence.

"That it has, during the years aforesaid, kept and maintained at its offices its stock books for the transfer of its capital stock; that during the said years its capital stock has been bought and sold upon the market, and the shares so bought and sold have been transferred upon its said stock books.

"That the plaintiff, although it has leased its railroad and other property mentioned in the said agreement, has therefore never gone out of business in connection with its property, nor disqualified itself from any activity under its charter in respect thereto."

Clearly, I think, the act of 1909 does not tax a corporation merely because it elects officers annually, keeps books for the transfer of its stock, and pays its clerks and its office expenses; nor even because it has capital stock and owns money in bank on which it receives the ordinary interest paid to depositors. It may have, or it may do, all this without being subject to the act, for the indispensible
62 foundation of the tax is the doing of corporate business. The tax is not upon property but is "a special excise tax with

respect to the carrying on or doing business by such corporation," and, therefore, if no corporate business is done, no excise can be laid. It is not a decisive test of doing such business, I think, that the corporation may possess unused powers, which, if used, might mark it as engaged in the corporate activity it was chartered to perform. If it does not in fact use these powers, it does not do business during the period of disuse, although it may have the capacity to do it at some time thereafter. For example: It is urged by the Government that the plaintiff was doing business in 1909 and 1910 because the lease to the Reading Railway Company contains the following paragraph:

"The Mine Hill Company shall and will, during the term hereby demised, maintain its corporate existence and organization; and at all times, and from time to time, during the continuance of the said term, when requested by the railway company, its successors or assigns, shall and will put in force and exercise each and every corporate power, and do each and every corporate act which the Mine Hill Company might now, or may at any time hereafter, lawfully put in force or exercise to enable the railway company to enjoy, avail itself of, and exercise, every right, franchise, and privilege in respect of the use, management, maintenance, renewal, extension, alteration, or improvement of the premises hereby demised, or intended so to be, and of the business to be there carried on, the railway company agreeing to indemnify and save harmless the Mine Hill Company against all loss, expense, damage, or liability for such exercise of corporate powers or performance of corporate acts, when exercised or done at the request of the railway company."

The only corporate power under this paragraph that is
63 referred to by the Government is the power of eminent domain, and, if it be conceded for present purposes that such power may still be possessed by the plaintiff, there is no suggestion that is has been used since the lease was made, and especially there is no suggestion that it was used during the tax years in question. If it should never be used, is the plaintiff nevertheless "engaged in business" now, and will it be so engaged throughout the whole term of the lease, merely because it holds unused a power that the State has not permitted it formally to transfer?

The defendant points also to the sixth paragraph of the lease:

"That if the railway company shall make default in the payment of the rent hereby reserved, or in any of the payments herein covenanted to be made by it, for a period of thirty days after the same shall have become due and shall have been demanded from it in writing by the Mine Hill Company, or shall fail to keep harmless the Mine Hill Company, as herein covenanted, after notice, it shall and may be lawful for the Mine Hill Company to declare this lease forfeited and at an end, and to reenter and repossess the whole of the demised premises as of its first and former estate; but such reentry and repossession shall not relieve the railway company from liability to the Mine Hill Company, its successors or assigns, for all arrears of

rent due and unpaid at the time, and for all damages resulting from the breach or breaches of covenant by the railway company."

But this is merely a contingent right to take back the property and operate it again. If the contingency should never happen, must it nevertheless be decided that the plaintiff is doing corporate business now, and will be doing corporate business hereafter for (say) 998 years from 1896, because there is a possibility that it may be obliged to retake possession at the end of that period, and operate the railroad for the remaining year of the term?

64 I am not considering the effect of tricks or devices to escape taxation by collusive transactions. This is a bona fide lease made years before the act of 1909 was passed, and under it the plaintiff has in fact gone out of business by the direct permission of the State legislature and is now living upon its income. Its life is continued, for a landlord must be alive, but it has no longer the power to operate a railroad—that being the only kind of corporate business it was created to transact—and, while it still retains one power and one contingent right, it has not exercised the power for 15 years and may never exercise it; and the contingency has not yet happened, and may never happen. If the power or the right should be exercised hereafter, the Government would not be foreclosed by this decision from asserting that the corporation was once more "engaged in business;" for the present, it seems to be enough to say that the Reading Railway, and not the plaintiff, is doing the corporate business originally entrusted to the plaintiff, and presumably is also being taxed for carrying it on. It seems hardly possible that both corporations can be taxed in respect of transporting the same freight and the same passengers. In my opinion there is no essential difference between this case and Zonne v. Minneapolis Syndicate, 220 U. S., 187.

The rule is hereby made absolute, and the clerk is directed to enter judgment in favor of the plaintiff for want of a sufficient affidavit of defense. (Exception to the defendant.)

Præcipe for Judgment and Assessment of Damages and Judgment.

(Filed January 10, 1912.)

65 Enter judgment in favor of the plaintiff and against the defendant for want of a sufficient affidavit of defense, in accordance with the opinion handed down on the 2d day of January, 1912, and assess the damages as stated below.

ELI K. PRICE,
G. W. PEPPER,
Per L. W. ROBEY,
Attorneys for Plaintiff.
(January 10, 1912.)

To clerk of the U. S. District Court, Eastern District of Pennsylvania.

Assessment of Damages.

Principal	$2,609.02
Interest from May 24, 1911, to January 10, 1912	98.71
Principal	2,406.21
Interest from June 28, 1911, to January 10, 1912	77.39
	5,191.33

I hereby assess damages as above.

LEO A. LILLY,
Deputy Clerk of the United.
States District Court.

Judgment.

Before McPHERSON, *J.:*

And now, to wit, this 10th day of January, 1912, by order of præcipe filed and in accordance with the opinion of the court filed January 2, 1912, judgment is hereby entered in the above entitled case in favor of the plaintiff and against the defendant for want of a sufficient affidavit of defense in the sum of five thousand
66 one hundred and ninety-one and 33/100 dollars ($5,191.33).

Attest:

LEO A. LILLY, *Deputy Clerk.*

Certificate of Probable Cause.

(Filed January 18, 1912.)

Before McPHERSON, *J.:*

And now, to wit, this 18th day of January, A. D. 1912, the court, on motion of J. Whitaker Thompson, Esq., attorney of the United States for the Eastern District of Pennsylvania, representing the defendant, hereby certifies that there was probable and reasonable cause for the act of the defendant in demanding and collecting the internal-revenue tax for the refund of which claim has been made and suit brought by the plaintiff in the above entitled cause, and in which a judgment has been rendered in favor of the said plaintiff.

By the court.

Attest:

LEO A. LILLY, *Deputy Clerk.*

Assignments of Error.

(Filed January 18, 1912.)

And now comes William McCoach, the above-named defendant, and assigns the following errors to the judgment and decree of the learned court entered January 10, 1912, in the foregoing proceedings, to wit:

1. The learned court erred in directing that judgment be entered in favor of the plaintiff for want of a sufficient affidavit of defense.
67 2. The learned court erred in not holding that under the provisions of section 38 of the act of Congress approved the

fifth day of August, A. D. 1909, entitled "An act to provide revenue, equalize duties, and encourage the industries of the United States and for other purposes," the taxes paid by the plaintiff under protest were lawfully assessed and collected by the defendant.

3. The learned court erred in not holding that the plaintiff corporation was carrying on and doing business within the meaning of the act aforesaid during the tax years of 1909 and 1910.

4. The learned court erred in not holding that the plaintiff corporation in the above entitled cause had no lawful cause of action to recover from the defendant.

5. The learned court erred in holding that the plaintiff corporation in the above entitled cause had a lawful cause of action to recover from the defendant.

J. WHITAKER THOMPSON,
United States Attorney.

Petition of defendant for writ of error to the United States Circuit Court of Appeals, and order of allowance.

(Filed January 18, 1912.)

To the honorable the judges of the District Court of the United States for the Eastern District of Pennsylvania:

The petition of William McCoach, collector of internal revenue for the First District of Pennsylvania, respectfully represents:

That there was filed, on the tenth day of January, A. D.
68 1912, in the above proceedings, a judgment and decree of said court entering judgment in favor of the plaintiff for the amount of the tax and interest thereon.

Whereby your petitioner was aggrieved and hereby files his assignments of error setting forth separately and particularly each error which your petitioner assigns in said petition.

Wherefore your petitioner prays for a writ of error to the United States Circuit Court of Appeals for the Third Circuit, under and according to the laws of the United States in that behalf made and provided, and also that all further proceedings in the said district court shall be suspended and stayed until the determination of said writ of error by the said United States Circuit Court of Appeals, and that a transcript of the record and proceedings and papers upon which such final judgment was made, duly authenticated, may be sent to the United States Circuit Court of Appeals.

And your petitioner will ever pray, etc.

J. WHITAKER THOMPSON,
United States Attorney.

Before McPHERSON, *J.:*

Writ allowed this 18th day of January, A. D. 1912.

By the court.

Attest:

LEO A. LILLY,
Deputy Clerk.

Writ of error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the District Court of the United States for the Eastern District of Pennsylvania, greeting:

Because in the record and proceedings, as also in the rendi-
69 tion of the judgment of a plea which is in the said district court, before you, or some of you, between the Mine Hill and Schuylkill Haven Railroad Company, plaintiff, and William McCoach, collector of internal revenue, defendant, a manifest error hath happened, to the great damage of the said William McCoach, collector of internal revenue, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Third Circuit, together with this writ, so that you have the same at the city of Philadelphia within thirty days, in the said United States Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, at Philadelphia, the 19th day of January, in the year of our Lord one thousand nine hundred and twelve.

[SEAL.]

LEO A. LILLY,
Deputy Clerk of the District Court of the United States.

Before McPHERSON, *J.:*

Allowed.

By the court.

Attest:

LEO A. LILLY,
Deputy Clerk.

70 *Citation.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Mine Hill & Schuylkill Haven Railroad Company, greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Third Circuit, to be holden at the city of Philadelphia within thirty days, pursuant to a writ of error filed in the clerk's office of the District Court of the United States, Eastern District of Pennsylvania, wherein, William

McCoach, collector of internal revenue, is plaintiff in error, and you are defendant in error to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice shall not be done to the parties in that behalf.

Witness the Honorable John B. McPherson, Judge of the District Court of the United States this 19th day of January, in the year of our Lord one thousand nine hundred and twelve.

By the court.

Attest:

[SEAL.]

LEO A. LILLY,
Deputy Clerk.

Service accepted.

G. W. PEPPER,
Attorney for Defendant in Error.

71 *Clerk's Certificate.*

UNITED STATES OF AMERICA, EASTERN DISTRICT OF PENNSYLVANIA, *Sct.:*

I, William W. Craig, clerk of the District Court of the United States, for the Eastern District of Pennsylvania, do hereby certify that the annexed and foregoing is a true and faithful copy of the pleas and proceedings in the case of Mine Hill & Schuylkill Haven Railroad Company v. William McCoach, collector, No. 1494, April session, 1911, now remaining among the records of the said court in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said district court at Philadelphia, this 17th day of February, in the year of our Lord one thousand nine hundred and twelve, and in the one hundred and thirty-sixth year of the Independence of the United States.

[SEAL.]

WM. W. CRAIG,
Clerk District Court U. S.
By LEO A. LILLY, *Deputy Clerk.*

72 In the United States Circuit Court of Appeals for the Third Circuit.

WILLIAM McCOACH, COLLECTOR, PLAINTIFF IN error, *vs.* MINEHILL & SCHUYLKILL HAVEN R. R. CO., DEfendant in error.	No. 1600 (list No. 34). March term, 1912.

And afterwards, to wit, on the eleventh day of April, 1912, come the parties aforesaid, by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Hon. George Gray, circuit judge, Hon. Joseph Buffington, circuit judge, and the

Hon. Edward G. Bradford, district judge, and the court not being fully advised in the premises, takes further time for the consideration thereof.

And afterwards, to wit, on the eighth day of May, 1912, come the parties aforesaid by their counsel aforesaid, and the court now being fully advised in the premises, renders the following decision:

73 In the United States Circuit Court of Appeals for the Third Circuit.

WILLIAM McCOACH, COLLECTOR OF INTERNAL REVENUE, plaintiff in error, *vs.* MINEHILL & SCHUYLKILL HAVEN RAILROAD COMPANY, defendant in error.	No. 1600. March term, 1912.

In error to the District Court of the United States for the Eastern District of Pennsylvania.

Before GRAY and BUFFINGTON, circuit judges, and BRADFORD, district judge.

BUFFINGTON, *Circuit Judge:*

In the court below the Minehill and Schuylkill Haven Railroad Company sued William McCoach, collector of internal revenue, to recover certain taxes with interest and penalties, assessed by him against it for the years 1909 and 1910, under the corporation excise statute of 1909. The tax was paid under protest and on threatened distraint and sale. A demand for refund having been denied by the commissioner of internal revenue, the railroad brought this suit to recover said tax. The case turns on the question whether the railroad during the years covered by the tax was, in the words of the statute, "engaged in business," and therefore by its provisions subjected "to pay annually a special excise tax with respect to the carrying on or doing business by such corporation," etc. The facts of the case are: The plaintiff was chartered by the State of Pennsylvania in 1828 for the purpose of building and operating a railroad.
74 This it did until 1896, when, by virtue of certain enabling legislative powers, it transferred all its property, under a 999-years lease, on a rental of 6 per cent on its outstanding capital stock, to the Reading Railway Company, and "also all the rights, powers, and franchises (other than the franchise of being a corporation), and privileges," etc. Since then the corporation has done nothing save maintain its corporate existence, collect its rent and distribute it among its stockholders. After a full discussion of the facts, to which, reported in —— Fed. Rep., ——, reference may here by made, the court below thus summed up its conclusion in these words:

"I am not considering the effect of tricks or devices to escape taxation by collusive transactions. This is a bona fide lease, made

years before the act of 1909 was passed, and under it the plaintiff has in fact gone out of business by the direct permission of the State legislature and is now living upon its income. Its life is continued, for a landlord must be alive, but it has no longer the power to operate a railroad—that being the only kind of corporate business it was created to transact—and while it still retains one power" (the right of eminent domain) "and one contingent right" (forfeiture for nonpayment of rent), "it has not exercised the power for fifteen years and may never exercise it; and the contingency has not yet happened and may never happen. If the power or the right should be exercised hereafter, the Government would not be foreclosed by this decision from asserting that the corporation was once more 'engaged in business'; for the present it seems to be enough to say that the Reading Railway, and not the plaintiff, is doing the corporate business originally entrusted to the plaintiff, and presumably is also being taxed for carrying it on. It seems hardly possible that both corporations can be taxed in respect of transporting the same freight and the same passengers. In my opinion there is no essential difference between this case and Zonne v. Minneapolis Syndicate, 220 U. S., 187."

Agreeing as we do therewith, the judgment below is affirmed.

75 In the United States Circuit Court of Appeals for the Third Circuit.

WILLIAM McCOACH, COLLECTOR, PLAINTIFF in error, *vs.* MINEHILL & SCHUYLKILL HAVEN R. R. Co., defendant in error.	No. 1600 (list No. 34). March term, 1912.

In error to the District Court of the United States for the Eastern District of Pennsylvania.

This cause came on to be heard on the transcript of record from the District Court of the United States for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed, with costs.

Philadelphia, May 8, 1912.

JOHN B. McPHERSON, *Circuit Judge.*

Endorsed: No. 1600.
Order affirming judgment.
Received and filed May 8, 1912. Saunders Lewis, jr., clerk.

76 UNITED STATES OF AMERICA, EASTERN DISTRICT OF PENNSYLVANIA, THIRD JUDICIAL CIRCUIT, *sct.:*

I, William P. Rowland, deputy clerk of the United States Circuit Court of Appeals for the Third Circuit, do hereby certify the fore-

going to be a true and faithful copy of the original transcript of record and proceedings in this court, in the case of William McCoach, collector, plaintiff in error, vs. Minehill & Schuylkill Haven Railroad Company, defendant in error, No. 1600, March term, 1912, on file, and now remaining among the records of the said court, in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said court, at Philadelphia, this twenty-ninth day of May, in the year of our Lord one thousand nine hundred and twelve, and of the independence of the United States the one hundred and thirty-sixth.

[SEAL.]

WM. P. ROWLAND,
Deputy Clerk of the U. S. Circuit Court of Appeals, Third Circuit.

77 Supreme Court of the United States.

WILLIAM M. McCOACH, COLLECTOR OF INTERNAL REVENUE, petitioner,
vs.
MINEHILL & SCHUYLKILL HAVEN R. R. Co.
} October term, 1911. No. 1169.

Stipulation as to return to writ of certiorari.

It is hereby stipulated by counsel for the parties to the above-entitled cause that the certified copy of the record now on file in the Supreme Court of the United States, shall constitute the return of the clerk of the Circuit Court of Appeals for the Third Circuit to the writ of certiorari granted herein.

F. W. LEHMANN,
Solicitor General.

G. W. PEPPER,
Counsel for Respondent.

JUNE 21, 1912.

78 OFFICE OF THE CLERK,
UNITED STATES CIRCUIT COURT OF APPEALS,
FOR THE THIRD CIRCUIT,
Philadelphia, June Twenty-seventh, MCMXII.

JAMES H. McKENNEY, Esq.,
Clerk U. S. Supreme Court, Washington, D. C.

SIR: We are to-day in receipt of your court's writ of certiorari in the case of McCoach, collector vs. Minehill & Schuylkill Haven Railroad Company.

We had already issued a certified copy of the transcript of record and proceedings in our court in this case, which has been filed with you and may be considered as the return to your writ above referred to.

Respectfully,

SAUNDERS LEWIS, Jr., *Clerk.*

79 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the United States Circuit Court of Appeals for the Third Circuit, greeting:

Being informed that there is now pending before you a suit in which William McCoach, collector of internal revenue, is plaintiff in error, and Minehill and Schuylkill Haven Railroad Company is defendant in error, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the District Court of the United States for the Eastern District of Pennsylvania, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United
80 States, do hereby command you that you send without delay to the said Supreme Court as aforesaid the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the honorable Edward D. White, Chief Justice of the United States, the 19th day of June, in the year of our Lord one thousand nine hundred and twelve.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

81 (Indorsed:) File No. 23245. Supreme Court of the United States, No. 1169. October term, 1911. William M. McCoach, collector, etc., vs. Minehill & Schuylkill Haven R. R. Co. Writ of certiorari. Office of the clerk. Received July 2, 1912. Supreme Court U. S. Received and filed June 27, 1912. Saunders Lewis, jr., clerk.

(Indorsement on cover:) File No. 23245. Supreme Court U. S. October term, 1912. Term No. 670. William M. McCoach, collector, etc., petitioner, vs. Minehill & Schuylkill Haven R. R. Co. Writ of certiorari and return. Filed July 2, 1912.

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In the Supreme Court of the United States.

OCTOBER TERM, 1912. No. 670.

WILLIAM MCCOACH, COLLECTOR OF INTERNAL REVENUE, *Petitioner,*

v.

MINEHILL AND SCHUYLKILL HAVEN RAILROAD COMPANY, *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

MOTION BY THE UNITED STATES TO ADVANCE.

The Solicitor General, on behalf of the United States, moves that this case be advanced and assigned for argument at a very early day.

The briefs for both sides have been printed and filed; and *both sides agree* that the argument may be *limited to one hour a side.*

The sole question involved is whether or not this case falls within the principle of *Mitchell* v. *Clark Iron Company,* 220 U. S. (Corporation Tax cases), or *Zonne* v. *Minneapolis Syndicate,* 220 U. S. 187

(Corporation Tax cases), the question being whether a lessor railroad is liable for the corporation tax upon the rental received by it from a lessee railroad operating the property.

Reasons for advancement.

The Treasury Department (Commissioner of Internal Revenue) has refused to accept as correct the principle announced by the lower court in the case at bar and has proceeded to make assessments and collect taxes as heretofore from lessor corporations. These corporations, to protect their rights, have instituted or propose to institute suits for the recovery of the taxes so paid under protest.

There are now pending *five* suits in different Circuit Courts of Appeals and *thirty-eight* suits in various District Courts involving the same question as is here involved.

There are approximately 300 claims involving about $700,000 now pending or rejected in the office of the Commissioner of Internal Revenue, which will unquestionably be the subject of *further suits* by the lessor railroads to recover back the taxes under the principle decided by the lower court in the present case.

Counsel for many large railway companies and other similar concerns are simply awaiting a decision by the Supreme Court in this case before instituting suits to recover back taxes they have been compelled to pay under protest.

One southeastern railway company is the lessor of some 25 different lines; another railway company is the lessor of more than 50 such lines, while a certain telegraph company operates nearly 100 such corporations. Unless an authoritative decision is promptly rendered by this court on the subject, a great number of corporations that are now awaiting such decision will, in order to protect themselves from the statute of limitations, be compelled to enter suit.

The Commissioner of Internal Revenue has urged the Department of Justice to endeavor to obtain an early hearing of the case upon the ground that there are "some thousands of cases, involving hundreds of thousands of dollars of taxes, which will be determined by the decision of the Supreme Court in this case, all of which makes it highly important that the decision should be reached at as early a date as possible in order to avoid the friction and ill feeling undoubtedly created by the assessment and collection of taxes under conditions of doubt as to the liability caused by the decision of the lower courts in this case." (Letter dated Oct. 30, 1912, from the Commissioner of Internal Revenue to the Solicitor General.)

After the decision of the case at bar by the Circuit Court of Appeals it was selected as a test case, in which the lessor railroad and the United States joined in requesting a writ of *certiorari*. This was for the purpose of getting a final decision on this

important point in the practical administration of the revenue laws, so as to avoid the great mass of litigation which it was plainly seen would follow as the result of the decision of the lower court exempting the railroads from the tax.

The time is approaching for again levying the taxes for next year, and it is most important that the law should be settled before the tax is assessed and collected for that period; the Commissioner of Internal Revenue insists upon adhering to his policy of compelling payment by the lessors, and he will not follow the decision of the lower courts in this case until the Supreme Court has ruled upon the subject.

It is for these reasons of wide public interest and importance that the United States begs to renew its motion to advance this case.

WM. MARSHALL BULLITT,
Solicitor General.

NOVEMBER 14, 1912.

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In the Supreme Court of the United States.

OCTOBER TERM, 1912.

WILLIAM MCCOACH, COLLECTOR OF INTERNAL REVENUE, PETITIONER,
v.
MINEHILL AND SCHUYLKILL HAVEN RAILROAD COMPANY, RESPONDENT.
} No. 670.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

MOTION TO ADVANCE.

The Solicitor General, on behalf of the United States, moves that this case be advanced for hearing on October 15, 1912, after the cases already assigned for that day.

The briefs for both sides have been printed and filed.

The sole question involved is whether or not this case falls within the principle of *Mitchell* v. *Clark Iron Company*, 220 U. S. 107 (Corporation Tax Cases), or *Zonne* v. *Minneapolis Syndicate*, 220 U. S. 187 (Corporation Tax Cases).

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STATEMENT OF THE CASE.

In 1896 the Minehill & Schuylkill Haven Railroad Company (hereinafter called the Minehill Company) leased its railroad to the Philadelphia & Reading Railway Company (hereinafter called the Reading Railway) for 999 years at an annual rental of $252,612.

By the terms of the lease the Minehill Company agreed to maintain its corporate existence and organization, and to exercise its corporate powers whenever necessary to enable the Reading Railway to enjoy the benefits of its lease, etc.

The Minehill Company has continued its corporate organization ever since, maintaining an office and officers, receiving rentals and dividends, declaring dividends, investing and managing its surplus funds, paying interest, etc.

The question then is whether the Minehill Company is engaged in carrying on or doing business within the meaning of the Corporation Tax Law, or whether, by virtue of the lease, it has "practically gone out of business in connection with the property and disqualified itself from any activity in respect to it," as was the case of the Minneapolis Syndicate in the *Zonne* case.

It is just a question whether the leasing of one railroad to another falls within the principle of the *Clark Iron Company* case or that of the *Zonne* case.

REASONS FOR ADVANCEMENT.

There are innumerable instances in the United States of railroad companies that have leased their

properties to other railroad companies at large rentals, and in which the amount of income and, consequently, the amount of tax involved is very large; and in order that there may be a proper administration of the Corporation Tax Law, it is important for the Government to know whether or not the leasing by one railroad of its properties to another exempts the lessor railroad from paying the corporation tax.

Numerous appeals are being prosecuted in similar cases, and the early decision of this case would enable a summary disposition to be made of numerous other cases that otherwise will be going through the various courts preliminary to finally getting here.

Opposing counsel concurs in this motion.

WM. MARSHALL BULLITT,
Solicitor General.

OCTOBER 15, 1912.

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In the Supreme Court of the United States.

OCTOBER TERM, 1911.

WILLIAM McCOACH, COLLECTOR OF INTERNAL REVENUE, PETITIONER,
v.
MINEHILL AND SCHUYLKILL HAVEN RAILROAD COMPANY.
No. ——.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

The Minehill Company, upon the facts stated in the petition for certiorari, can not be said to have "practically gone out of business in connection with the property," and to have "disqualified itself by the terms of reorganization from any activity in respect to it," as was the case in *Zonne* v. *Minneapolis Syndicate*, 220 U. S. 187.

Here there was no reorganization of the company at all. On the contrary, it continued its existence with all its powers unimpaired, and by the very terms of the lease had obligated itself to do so.

It maintained its organization, with its board of managers, officers, and clerks, kept an office for the transaction of business, which involved an annual expenditure of more than five thousand dollars, and kept a contingent fund, presumably to meet emer-

gencies that might from time to time arise. Neither its authority nor its activity was limited, as in the *Zonne* case, to holding title subject to the lease, and to receiving and distributing the rentals which might accrue under the terms of the lease, or the proceeds of any sale of the property if any should be sold.

The lease itself recognized that the Minehill Company owed duties and obligations to the public from which it could not relieve itself, and that all the powers required for the efficient maintenance and operation of the railroad could not be exercised without the participation of the Minehill Company. (R. 30–39.)

The first stipulation is as to rent and provides, among other things, that any taxes levied upon the rent shall be paid by the lessor. This required its continued existence and its business activity in case such a tax were imposed.

The second stipulation is as to keeping the property in good order and in public use and operating it efficiently. The actual performance of these duties, public in their nature, is undertaken by the lessee, but the duties themselves are not abdicated, nor attempted to be, by the lessor. They are, on the other hand, recognized as existing and continuing on the part of the lessor as well as on the part of the lessee, and so the lessor stipulates for indemnity in case it is held to account for any neglect of duty, or failure to perform it, by the lessee. This involves activity on the part of the lessor in the way of continued and continuous supervision of the conduct of

the lessee and also the assertion from time to time of its right to indemnity in case it has suffered from any default of the lessee.

This second stipulation also provides for the abandonment of colliery lines and the line north of Minehill. The colliery lines might be abandoned when they cease to pay, but there might well be question as to when that condition existed, and in its proper determination the lessor was interested. The line north of Minehill could be abandoned and the property upon it sold and the proceeds applied to the purchase and reduction of the lessor's capital stock, when, in the judgment of the lessee, the line became unprofitable and undesirable to use, and it could be legally done "without working a forfeiture or any impairment of the chartered rights and franchises of the Mine Hill Company as to its railroads, or any part thereof, or without creating any liability on the part of the Mine Hill Company or the Railway Company, to the public or the Commonwealth, for the non-user of such portion of the railroad lines." Here is the recognition of a constant and active interest in the management and operation of the property by the lessee.

Still further, this second stipulation contemplates changes in the location of the railroad because of proximity to veins of mineral, and also for the purpose of widening, straightening, and improving it, and the new location is to become the property of the lessor and subject to the terms of the lease.

The third stipulation provides expressly that the lessor shall "maintain its corporate existence and organization," and further "*when requested by the Railway Company, its successors or assigns, shall and will put in force and exercise each and every corporate power, and do each and every corporate act which the Mine Hill Company might now, or may at any time hereafter, lawfully put in force or exercise to enable the Railway Company to enjoy, avail itself of, and exercise every right, franchise and privilege in respect of the use, management, maintenance, renewal, extension, alteration or improvement of the premises hereby demised, or intended so to be, and of the business to be there carried on, the Railway Company agreeing to indemnify and save harmless the Mine Hill Company against all loss, expense, damage or liability for such exercise of corporate powers or performance of corporate acts, when exercised or done at the request of the Railway Company.*" (R. 36, 37.)

This is very different from the *Zonne* case. There the lessor had no power; it expressly stripped itself of all power, except to get something from the lessee and give it to the shareholders. There was left to the lessor no duty with respect to the property and no control over it. The lessee might do as it would; it might not occupy the property, nor rent it to others, but allow it to stand idle, and the lessor could not complain, for it had reserved no right of control and acknowledged no duty, having no purpose in life except to hold the title to the property subject to the lease, "and for the convenience of its stockholders,

to receive and distribute among them, from time to time, the rentals that accrue under said lease, and the proceeds of any disposition of said land." The Minnesota syndicate succeeded in making of itself what the appellee aspired to be in *Cedar Street Co.* v. *Park Realty Co.* (*Corporation Tax cases*), 220 U. S. 107, "an incorporated gentleman of leisure," with no apparent reason for existence, but the Park Realty Co. failed in this high ambition, and so did the lessee in the case at bar.

The lease under consideration in its third stipulation plainly recognizes that for properly maintaining the railroad in public use and operating it efficiently the powers of both companies are required, and while the lessor is less active than the lessee, its responsibility remains always, and it may at any time be called into action.

The fourth stipulation is of like effect. At any and all times the lessor must make any lease, deed, transfer, and agreement to more fully confirm, grant, and secure not simply the title to the property demised, but as well to secure all the rights and privileges granted.

The sixth stipulation is, in effect, among other things, a covenant by the lessee to faithfully discharge all the duties of a railroad company to the public, for if it does not keep the lessor harmless against any default the lease is forfeited and the lessor may reenter and repossess itself of the property.

But the Minehill Company is held to duty, and to constant duty, by the law as well as by its lease. By

its lease it did not discharge itself from all duty and by the law it could not do so.

Its charter imposed upon it various duties which it must perform so long as it holds its corporate powers and continues its corporate existence.

Section 17 of the charter provides that it shall construct and maintain sufficient causeways at all crossings of public roads to enable persons travelling such roads to cross and pass over or under its railroad. It may discharge this duty through a lessee but it can not abdicate it. And what it does through a lessee in the discharge of this duty is as if done by itself.

Section 18 makes similar provision as to causeways at private crossings. And for failure to perform its duties under either section 17 or section 18 the company is liable to prosecution.

Section 23 requires the company to complete the road within a specified time, and further provides that "if, after the completion of the said railroad, the said corporation shall suffer the same to go to decay, and be impassable for the term of two years, then this charter shall become null and void, except so far as compels said company to make reparation for damages."

So long, then, as the company continues its corporate existence, and it has stipulated by its lease to continue it, it is under a duty to maintain its railroad. Its life depends upon the performance of this duty.

The charter of the company confers upon it various powers and among them is the power of eminent

domain, essential to be exercised whenever, for any of the purposes mentioned in the lease, a new location of any portion of the railroad may be desired.

It is settled law in Pennsylvania that in operating the leased line the lessee possesses the powers and is subject to the duties, liabilities, and restrictions conferred and imposed by the charter of the lessor, not those accruing under its own charter. (*Penna. Railroad Co.* v. *Sly*, 65 Penna. 205.)

The law is well stated in the following paragraph from "Thompson on Corporations," Vol. III, section 2516:

> The power of eminent domain is granted to railroad companies and like quasi-public corporations, is a personal trust, and cannot be delegated or transferred, without legislative sanction, to the lessee. The power remains with the lessor, and where its property cannot be successfully operated without the acquisition of other property, the lessor may exercise the right of eminent domain for this purpose, even though the main property is leased for the entire life of the corporation and the property sought to be taken will be used solely by the lessee.

To the same effect is the following note to the second edition of "Elliott on Railroads," par. 461, note 91:

> The execution of a lease does not, ordinarily, confer upon the lessee the franchise to be a corporation nor a franchise to take property under the power of eminent domain; but the legislature may, perhaps, by express and apt words confer such franchises. Such fran-

> chises do not pass under authority conferred in general terms to execute a lease. The general authority does not imply that the lessee shall take such high prerogative franchises, although it does imply that the lessee shall have power to do such things as are reasonably necessary to enable it to properly operate the road.

This reserved power was recognized in the recent case of *Snyder* v. *B. & O. Railroad Company*, 210 Penna. 500, in which it was held that the right of a lessor of a railroad to widen its road for additional tracks, and thereby to condemn a dwelling house, was not affected by the fact that the company had leased its right to another company, and that the widening operated for the benefit of the lessee. In his opinion, Mr. Justice Thompson cited with approval the following language from the earlier case of *Glaser* v. *Railroad Company* (208 Penna. 328):

> "The inference that the taking is not for the benefit of the defendant company because its road has been leased to the Baltimore and Ohio, is not warranted by that fact. It has been held in every case, where the question arose, that when the corporate identity of the lessor company was maintained, that its statutory powers were continued, although the exercise of them inured partly to the advantage of the lessee company."

Continuing, the court used the following language:

> The contention of the appellants that as the Glenwood Company had leased its railroad and property and owns no cars or motive power

> that the appropriation of appellants' land was not necessary to increase its facilities for business and transportation is confronted with the findings of the learned trial judge that the company has, by a proper resolution, determined that it is necessary and in addition that as a matter of fact that it is so. The power of the board of directors to determine the necessity of widening and improving is lodged with it, and its action is conclusive, unless fraud or bad faith be shown. As a lessee company operating a road ordinarily furnishes most of the cars and all that is necessary in the conduct of transportation, a lessor company may deem it necessary to widen its road and improve the leased property in order to meet the demands of the increased business passing over it. In fact the failure of a lessor company so to exercise its power in certain contingencies, might in some cases operate as destructive of important rights of a lessee in the operation of the leased property and thus render its lease almost valueless.

A similar holding is reached in regard to the reserved power of the putting into force by the lessor of franchises which were unexercised at the time of the lease. In the case of *Lewis, Receivers of the Reading Railroad Company*, v. *G., N. & P. R. R. Co.*, reported in 16 Phila. 608, it was held that a lessor's unexercised franchise and right to appropriation and construction did not pass, by virtue of a general lease, to its lessees. The following language of Judge Ross is pertinent upon this question (p. 614):

> It is not denied, nor can it be pretended, that the lessees did not acquire the right to run

and operate the road, and to all and everything which of necessity was necessarily incident to its running, general operation and management as an existing road with its then exercised franchise. It could repair tracks, and, within the limits actually appropriated at the time of the demise, construct new tracks; it could build bridges, depots, etc., etc., on the ground appropriated by the lessees, and, in fact, could do everything to promote safety, despatch, security and public accommodation, in conducting business as common carriers over and along the road. It obtained, by the lease, every operating power, every franchise existing and exercised at the time the lease was executed. All this is clear, but it does not follow that the demise passed, or could legally pass, the power to exercise or put in force a franchise, such as a right to appropriate a public easement or private property for its corporate use. In order to acquire a right to exercise such a franchise by a corporate lease there must be legislative authority. This is well settled.

The lease in this case recognized the law to be as declared by the authorities we have cited. The Minehill Company possessed powers as well as property, powers which it, and it alone, could exercise, and the exercise of which from time to time as conditions changed were essential to the proper and efficient operation of the property. And so it was stipulated that the company should continue its organization with all its powers unimpaired and exercise them whenever occasion demanded.

In the *Zonne* case the Minnesota syndicate was a private corporation, owning private property and charged with no duty to the public. Such a company, it was held, could strip itself of its powers to such an extent that it remained a mere corporate conduit for the conveyance of rents from its tenants to its shareholders, and this process of transmitting rents, as to the corporate conduit, was held not to be the carrying on or doing business.

In the present case we have a public corporation owning property affected with a public interest, charged with a public duty, and possessing public powers. It makes a lease of its property recognizing the nature of that property, its own character and the quality of its powers and duties. It stipulates for the maintenance of the property in public use, and for the performance of every public duty with respect to it by the lessee, but does so in the view that its own responsibility to the public remains, and so provides for indemnity in case of neglect or breach of duty by the lessee and for a resumption of duty if the lessee shall prove faithless. It does more, and stipulates that its powers, all of which it reserves unimpaired, shall be exerted to whatever extent may be necessary to promote the proper use of this public property. It could not do less and live, for its powers and its duties constituted its life. So it was not left either dead or dormant by the lease. It has the constant interest and the constant duty to keep in touch with its lessee and its property to see that obligations which it and its lessee both owe to the public with

respect to that property are fully performed. For this it maintains its office and organization, its salaried officers and clerks, who, it is to be presumed, are not paid something for doing nothing, and to meet emergencies as they arise it maintains its contingent fund. And all this constitutes business within the ruling of the *Corporation Tax Cases*. It occupies the time, attention and labor of the officers and clerks of the Minehill Company and it is done for the purpose of a livelihood or profit. The two companies, the Minehill and Schuylkill Haven Railroad Company and the Philadelphia and Reading Railway Company, are both engaged in the business of maintaining and operating the Minehill Railroad, one more actively than the other, but both engaged; and the Minehill Company no more limits its interest and activities to the receipt of rent than does the Philadelphia and Reading to the payment of the rent. The Minnesota syndicate turned over its property to its lessee and had no concern in the management or conduct of it. The Minehill Company operates its railroad through the Philadelphia and Reading Company, and, besides, lends immediate aid and assistance whenever that is required.

It is respectfully submitted that the case presented is one which merits consideration and determination by this court.

F. W. LEHMANN,
Solicitor General.

JUNE, 1912.

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In the Supreme Court of the United States.

OCTOBER TERM, 1911.

WILLIAM MCCOACH, COLLECTOR OF INTERNAL REVENUE, petitioner,
v.
MINEHILL AND SCHUYLKILL HAVEN RAILROAD COMPANY.
} No. —.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

Comes now the Solicitor General on behalf of the petitioner and respectfully prays for a writ of certiorari to review the judgment rendered in the cause between the parties hereto by the United States Circuit Court of Appeals for the Third Circuit on the 8th day of May, 1912.

The parties.

The petitioner, William McCoach, is and at the time of the acts and transactions by him hereinafter set out was the Collector of Internal Revenue of the United States in and for the Eastern District of Pennsylvania, and the respondent, the Minehill and Schuylkill Haven Railroad Company, is and at all

the times hereinafter mentioned was a corporation of the State of Pennsylvania, organized and existing under the laws of the State of Pennsylvania. Act of March 24, 1828 (Pamphlet Laws, 205), and amendments thereto.

The original suit,

the final judgment in which it is sought to bring under review, was brought in the Court of Common Pleas No. 4, for the County of Philadelphia, in the State of Pennsylvania, at the June term, 1911, by the respondent as plaintiff against the petitioner as defendant, and by writ of certiorari was removed to the Circuit Court of the United States for the Eastern District of Pennsylvania at Philadelphia in that State. (R. 4, 44.)

The object of the suit

was to recover from the petitioner the sum of five thousand and fifteen dollars and twenty-three cents ($5,015.23), the amount (with interest and penalties) which had been assessed against the railroad company for the taxing years 1909 and 1910 by the Commissioner of Internal Revenue of the United States, as due from it under section 38 of the act of Congress of August 5, 1909, 36 Stat. 11, 112, known as the "Corporation Tax Law." The money in the sum stated was collected by McCoach, as Collector of Internal Revenue, and was paid by the railroad company under protest. (R. 6–9).

The question involved

is whether the railroad company during the time involved was "carrying on or doing business" within the meaning of the Corporation Tax Law.

The facts

upon which the determination of the question depends are not disputed.

The railroad company was organized under the laws of the State of Pennsylvania, as stated, in 1828, and has continued as an existing corporation to the present time. It was chartered for the construction, operation, and maintenance of a railroad from Schuylkill Haven to Minehill, both in the State of Pennsylvania.

The act under which the railroad was organized was a special one.

Section 2 of the act empowers the company to purchase and hold real and personal estate, "and the same from time to time, to sell, mortgage, grant, alien or dispose of, and to make dividends of such portion of the profits as they may deem proper," and is restricted as to its liberties, privileges or franchises to "such as may be necessary or incident to the making of the said railroad," and is further restricted from holding or possessing any land "for any other purpose than the construction of the said railroad, or for toll houses, or other necessary works."

Section 14 gives it the right of eminent domain in entering upon land for the location of roads and taking of material therefor.

Section 17 provides penalties for the obstruction of public roads and for the neglect to provide and maintain causeways for crossings.

Section 21 provides "That on the completion of the said railroad, the same shall be esteemed a public highway, free for the transportation of all commodities, and the said company may charge and receive tolls, and for freights on and for the transportation of goods, wares and merchandise at the following rates," etc.

Section 23 provides that "if after the completion of the said railroad, the said corporation shall suffer the same to go to decay, and be impassable for the term of two years, then this charter shall become null and void, except so far as compels said company to make reparation for damages."

By a subsequent act of assembly the plaintiff was authorized to construct lateral railroads.

By the Pennsylvania act of April 23, 1861, sec. 1, P. L. 410, it is made lawful for railroad companies "created by and existing under the laws of this Commonwealth," to "enter into contracts for the use or lease of any other railroads upon such terms as may be agreed upon with the company or companies owning the same;" and by the act of February 17, 1870, section 1, P. L. 31, it is made lawful for any such company "to lease or become the lessees, by assignment or otherwise, of any railroad or railroads" which shall be "connected either directly or by means of intervening line, with the railroad or railroads of said company * * * so entering into such lease."

Under and pursuant to its charter the railroad company did construct, maintain and operate a railroad in the State of Pennsylvania, with branches and lateral lines.

On December 31, 1896, the railroad company entered into an agreement of lease with the Philadelphia and Reading Railway Company (R. 30) by which it leased to the latter company its railroad, with the constructions, rights of ways, water rights and privileges, depots, stations, and appurtenances generally, engines, locomotives, and all other rolling stock, equipments, personal property, and also all its rights, powers and franchises (other than the franchise of being a corporation), for a term of nine hundred and ninety-nine years, at a yearly rental of two hundred and fifty-two thousand, six hundred and twelve dollars ($252,612), "which is equivalent to six per centum on the present capital stock of the said Mine Hill Company."

The Philadelphia and Reading Company agrees by the lease—

First. To pay the stipulated rent and all taxes and assessments against the demised property, and all taxes and assessments levied on account of any business done upon the road or property, but not any taxes levied upon the rent to be paid or upon the capital stock of the Mine Hill Company, or upon the dividends declared by the company.

Second. To keep the property in good order, keep it in public use, maintain and efficiently operate it, and save the Mine Hill Company harmless from all

liabilities, damages, claims and suits, by reason of anything done, or omitted to be done, by the lessee, and at the expiration or other determination of the term surrender the property in good order and condition to the lessor, and pay to the lessor the sum of one hundred and forty eight thousand, two hundred and twenty two dollars ($148,222), the balance of the appraised value of certain personal property transferred to the lessee under a previous lease. It was provided that the lessee need not maintain lines or branches used exclusively by any one colliery, when the colliery was abandoned, or such line ceased to pay expenses. It was further provided that the whole or any part of the line, north of Mine Hill might be abandoned when in the judgment of the lessee it was unprofitable and undesirable to use it, and "it shall be found legally practicable to abandon so much of the said lines of railroad, without working a forfeiture or any impairment of the chartered rights and franchises of the Mine Hill Company as to its railroads, or any part thereof, or without creating any liability on the part of the Mine Hill Company or the Railway Company (lessee), to the public or the Commonwealth, for the non-user of such portion of the railroad lines." In case of such abandonment, the rails, superstructure, machinery and appliances of every kind north of Mine Hill were to be sold, the proceeds to be paid to the Mine Hill Company and applied to the purchase and cancellation of its own stock. The rent to be paid thereafter was to be reduced to the extent of the dividend applicable to the cancelled stock.

"*Third*. The Mine Hill Company shall and will, during the term hereby demised, maintain its corporate existence and organization; and at all times, and from time to time, during the continuance of the said term, when requested by the Railway Company, its successors or assigns, shall and will put in force and exercise each and every corporate power and do each and every corporate act which the Mine Hill Company might now, or may at any time hereafter, lawfully put in force or exercise to enable the Railway Company to enjoy, avail itself of, and exercise, every right, franchise and privilege in respect of the use, management, maintenance, renewal, extension, alteration or improvement of the premises hereby demised, or intended so to be, and of the business to be there carried on, the Railway Company agreeing to indemnify and save harmless the Mine Hill Company against all loss, expense, damage or liability for such exercise of corporate powers or performance of corporate acts, when exercised or done at the request of the Railway Company.

"*Fourth*. The Mine Hill Company shall and will from time to time hereafter, during the continuance of the hereby demised term, upon the request, and at the charge, so far as the expense of the papers needful therefor, of the Railway Company, make, execute and deliver unto the said Railway Company, all and every such further and other leases, deeds, transfers and agreements as by the said Railway Company shall be reasonably desired or required for fully granting and confirming unto the said Railway

Company the railroads and premises and rights hereinbefore mentioned and leased, or intended or agreed so to be, and for more fully confirming, granting and securing unto the said Railway Company all the rights and privileges herein mentioned, granted and secured, or intended so to be.

* * * * *

"*Sixth.* That if the Railway Company shall make default in the payment of the rent hereby reserved, or in any of the payments herein covenanted to be made by it, for a period of thirty days after the same shall have become due and shall have been demanded from it in writing by the Mine Hill Company, or shall fail to keep harmless the Mine Hill Company, as herein covenanted, after notice, it shall and may be lawful for the Mine Hill Company to declare this lease forfeited and at an end, and to re-enter and repossess the whole of the demised premises as of its first and former estate; but such reentry and repossession shall not relieve the Railway Company from liability to the Mine Hill Company, its successors or assigns, for all arrears of rent due and unpaid at the time, and for all damages resulting from the breach or breaches of covenant by the Railway Company.

"*Seventh.* All the covenants herein contained shall extend to and bind as covenants running with the land the successors and assigns of the respective parties hereto."

The lease will be found on pages 30 to 39 of the record.

Since December 31, 1896, the Philadelphia and Reading Railroad Company has been maintaining and operating the railroad under this lease.

As appears by the "Affidavit of Defence" made by the petitioner in the Circuit Court (R. 46, 48), the respondent, the Minehill Company, has kept and maintained an office for the transaction of business at 119 South Fourth Street, in the city of Philadelphia, and has maintained its corporate existence and organization by the annual election of a president and board of managers, and the board of managers has annually elected a secretary and treasurer of the company.

The Minehill Company has received its rental annually from its lessee and has annually received sums of money as interest on deposits and on a contingent fund which it maintains. The amount received by it as rental in each year 1909 and 1910 was $252,612.00. In 1909 it received $24,471.07 as interest on deposits and contingent fund, and in 1910 it received $24,882.74. The amount of the contingent fund and the purpose for which it is maintained are not disclosed by the record.

For "the ordinary and necessary expenses of the maintenance and operation of the business and properties of the corporation exclusive of interest payments" the Minehill Company paid in 1909 $5,809.33, and in 1910 $5,770.13. This was for salaries of officers and clerks and the expense of maintaining its offices and keeping up the activities of its corporate existence. (R. 48, 50, 55.)

During the years 1909 and 1910 the company kept and maintained at its offices stock books for the transfer of shares of its stock, and during those years its shares were bought and sold upon the market, and the shares so bought and sold have been transferred upon its books.

It is further alleged by the affidavit of defense (R. 48)—

> That the plaintiff, although it has leased its railroad and other property mentioned in the said agreement, has, therefore, never gone out of business in connection with its property, nor disqualified itself from any activity under its charter in respect thereto.

The Minehill Company made returns for the years 1909 and 1910 as required by the Corporation Tax Law, and paid the assessments made against it under protest, and later made application in regular form for a refund of the sums so paid as having been for taxes improperly paid. This application was refused, and thereupon the company brought suit, as before stated.

The contention of the company was that it was within the rule of *Zonne* v. *Minneapolis Syndicate*, 220 U. S., 187. The contention on behalf of the petitioner was that the company was, under the facts stated, "carrying on or doing business" during the years in question.

The Circuit Court, McPherson, district judge, sitting, decided for the company (R. 59 to 64), basing his decision on the *Zonne* case.

It is said in the course of the opinion, page 64, that "It seems hardly possible that both corporations (lessor and lessee) can be taxed in respect of transporting the same freight and the same passengers." As a matter of law and of fact the rent paid by the Philadelphia and Reading Railway Company is an expense of that company and in its returns should be and is deducted as such.

On writ of error to the Court of Appeals for the Third Circuit the judgment of the Circuit Court was affirmed.

The question presented, it is respectfully submitted, is one of manifest and great interest and importance, not limited in its application to the present case. It will present itself in numerous cases, as many of the railroad properties of the country are operated under substantially similar agreements of lease, and it is essential to the orderly and efficient administration of the corporation tax law that the question of what constitutes the "carrying on or doing business" be cleared of doubt as much as possible.

It is therefore respectfully prayed by the petitioner and on behalf of the Government that a writ of certiorari issue herein to the Circuit Court of Appeals for the Third Circuit to send to this court a full and complete transcript of the record and all proceedings in the case before it of *William McCoach, Plaintiff in Error*, v. *Minehill and Schuylkill Haven Railroad Company, Defendant in Error*, to the end that the cause may be reviewed and determined by

this court, and that the judgment of the said Court of Appeals may be reversed.

I am authorized to state that counsel for the respondent, Mr. George Wharton Pepper, concurs in the view that the case is an appropriate one for review on certiorari.

Respectfully submitted on behalf of the petitioner by

F. W. LEHMANN,
Solicitor General.

JUNE, 1912.

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INDEX.

In the Supreme Court of the United States.

OCTOBER TERM, 1912. No. 670.

WM. McCOACH, COLLECTOR OF INTERNAL REVENUE, *Petitioner,*

vs.

MINEHILL AND SCHUYLKILL HAVEN RAILROAD COMPANY, *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR THE UNITED STATES.

The question involved is whether a certain railroad company (having leased its road but continuing to maintain its corporate organization and to manage its finances) is "engaged in business" and "carrying on or doing business" within the meaning of the Corporation Tax Law.

The Minehill and Schuylkill Haven Railroad Co. (hereinafter called the Minehill Co.) sued the Collector of Internal Revenue at Philadelphia to recover $5,015.23 taxes for the years 1909 and 1910, paid under protest by the Minehill Co. under the Corporation Tax Law (R. 5).

The Circuit Court (McPherson, J.) and the Circuit Court of Appeals (Buffington, Gray, and Bradford,

J. J.) both held, on the authority of *Zonne* v. *Minneapolis Syndicate*, 220 U. S. 187, that the Minehill Co. was not engaged in business, and, therefore, that the taxes had been illegally assessed, and gave judgment for the Minehill Company against the collector. (R. 37, 41, 45.)

A writ of certiorari was granted to the United States. (R. 48; 225 U. S. 714.)

STATEMENT OF THE CASE.

The Minehill Co. is a Pennsylvania corporation (with a paid up capital stock of $4,210,200), which was chartered in 1828, with power to construct and operate a railroad, and with perpetual succession. (Laws 1827–1828, p. 205.) It constructed and, until Dec. 31, 1896, operated its 145 miles of railroad. (R. 30.)

By a lease dated Dec. 31, 1896, and entered into pursuant to legislative authority (Laws 1861, p. 410; Laws 1870, p. 31), the Minehill Co. leased its entire railroad and rolling stock and all its rights, powers, franchises, and privileges (except the franchise of being a corporation) to the Philadelphia & Reading Railway Co. (hereinafter called the Reading Ry.) for the term of 999 years, at an annual rental of $252,612, and subject to the provisions of the lease, which may be thus briefly summarized (R. 21–25):

I. The lessee, Reading Ry., agreed—

First. To pay a yearly rental of $252,612 (equivalent to 6 per cent on the then capital

stock of the Minehill Co.) and to pay all the taxes assessed on the leased property or on account of the business done, but not including any tax upon the rental or upon the capital stock or dividends of the Minehill Co. (R. 22.)

Second. To keep the road in repair, to efficiently operate it, to protect the Minehill Co. from all liability by reason of the method of the Reading Railway's operation of the road, and at the expiration of the lease to return the premises in good order, and to pay the Minehill Co. at that time the further sum of $148,222.04. (R. 23.)

Third. That in the event of default in the payment of rent, etc., the Minehill Co. could declare the lease forfeited and re-enter and take possession of the premises. (R. 25.)

II. The lessor, Minehill Co., agreed—

First. To "maintain its corporate existence and organization; and at all times, and from time to time, during the continuance of the said term, when requested by the railway company, its successors or assigns, shall and will put in force and exercise each and every corporate power and do each and every corporate act which the Minehill Company might now, or may at any time hereafter, lawfully put in force or exercise to enable the railway company to enjoy, avail itself of, and exercise, every right, franchise, and privilege in respect of the use, management, maintenance, renewal, extension, tended so to be, and of the business to be there carried on, the railway company agreeing to indemnify and save harmless the Minehill Company against all

loss, expense, damage, or liability for such exercise of corporate powers or performance of corporate acts when exercised or done at the request of the railway company."

Second. That the Reading Ry. might abandon certain colliery lines and parts of the demised property "whenever it shall be found legally practicable to abandon so much of the said lines of railroad without working a forfeiture or any impairment of the chartered rights and franchises of the Minehill Company as to its railroads, or any part thereof, or without creating any liability on the part of the Minehill Company or the railway company to the public or the Commonwealth for the nonuser of such portion of the railroad lines;" in which event the abandoned rails, machinery, etc., should be sold, and the proceeds turned over to the Minehill Co. and the annual rental proportionately reduced. (R. 23.)

Third. That the Reading Ry. might straighten, improve, or relocate portions of the road when the proximity of mining operations necessitated it, in which event the new location should vest in the Minehill Company, subject to the terms of the lease.

Fourth. To make at any time during the 999 years all further assurances necessary for the Reading Ry.

It will be observed that the lessor, Minehill Co., was to maintain its corporate existence and organization (not as a convenience to its stockholders but *as part of the consideration for the lease*), to exercise its

corporate powers, *i. e.*, that of eminent domain, etc., make further assurances, to receive annual rentals, to acquire new property if the location of the road were altered, and at the expiration of the lease receive $148,222.04 in cash and retake possession of the property; and that the Minehill Company was left in full possession, ownership, and control of all its assets except the railroad, real estate, and rolling stock. (R. 22–24.)

Accordingly, the Minehill Company continuously after 1896, and especially during the taxing years in controversy, 1909 and 1910, has, in accordance with its charter requirement that the stockholders shall annually elect a president and ten managers to "conduct the *business* of said company," annually elected a president and board of managers (R. 30); in accordance with its further charter requirement "that the said president and managers shall meet at such times and places as shall be found most convenient for the transaction of their *business*" the board of managers "has annually elected a secretary and treasurer" (R. 30); it has maintained an office and full corporate organization "for the transaction of its *business* at 119 South 4th St." (R. 30); this organization is not merely nominal but is evidently active and extensive as shown by the fact that it cost $5,809.33 in 1909 and $5,770.13 in 1910 for salaries and expenses of the "operation of the *business*" (R. 32, 34); it has semiannually collected its $252,612 of rental (R. 22, 30); it has annually collected interest upon its deposits of surplus money in bank (R. 31);

it has kept and maintained its stock transfer books and the shares of its capital stock have been bought and sold on the market and transferred on its books (R. 31); it has collected over $30,000 annually as dividends on its stock holdings in other companies (R. 31, 33, 35); it has maintained a contingent fund on which it has collected dividends (R. 31); it has preserved (although it does not appear whether it has actually exercised them) its full powers of condemnation ready for exercise at any moment and has preserved its power of retaking its property if the covenants of the lease are violated (R. 30).

Does such a corporation fall within the provision of the Corporation Tax Law (act August 5, 1909, sec. 38; 36 Stat., c. 6, pp. 11, 112–117) that every corporation "engaged in *business*" shall pay a special excise tax "with respect to the carrying on or doing *business* by such corporation"?

DECISION OF THE CIRCUIT COURT OF APPEALS.

The Circuit Court and the Circuit Court of Appeals were of the opinion that on the conceded facts the Minehill Co. "has, in fact, gone out of business and is now living upon its income," and that "while it still retains one power [eminent domain] and one contingent right [to retake possession on default by lessee], it has not exercised the power for 15 years and may never exercise it; and the contingency has not yet happened, and may never happen"; that the Reading Ry., and not the plaintiff, "is doing the corporate business originally entrusted to the plaintiff," and, therefore, that the Minehill Co. is not

liable to the tax, because "there is no essential difference between this case and *Zonne* v. *Minneapolis Syndicate*, 220 U. S. 187." (R. 40, 45.)

SPECIFICATION OF ERRORS.

The Circuit Court erred in holding (1) that the Minehill Co. was not "engaged in business," nor "carrying on or doing business"; (2) that it was not liable to the tax assessed under the Corporation Tax Law; (3) that it was, therefore, entitled to recover back the tax so paid under protest. (Assignment of Errors, R. 41, 42.)

ARGUMENT.

This case, while very important to the revenue system of the Government on account of the great number of substantially similar railroad leases now outstanding in this country, turns on a very narrow point, namely, Does it fall within the scope of that one of the *Corporation Tax Cases* known as *Zonne* v. *Minneapolis Syndicate*, 220 U. S. 187, or within the scope of those several other Realty Company Cases decided at the same time under the style of *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 169–171, and especially those known as *Mitchell* v. *Clark Iron Co.*, the *Broadway Realty Co.* case, and the *Motor Taximeter Cab* case?

It is just a question whether on the facts here disclosed it falls on this side or on that side of the line drawn by the court in differentiating the *Zonne* case from the other *Corporation Tax Cases*.

FIRST POINT.

The Minehill Co. was "engaged in business" and was therefore subject to the Federal corporation tax "with respect to the carrying on or doing business" by it.

The Corporation Tax Law (act Aug. 5, 1909, sec. 38; 36 Stat., c. 6, p. 11, 112–117) provides:

> That every corporation * * * organized for profit and having a capital stock represented by shares * * * and engaged in business in any State * * * shall be subject to pay annually a special excise tax with respect to the carrying on or doing business by such corporation * * * equivalent to 1% upon the entire net income over and above $5,000 received by it from all sources during such year, etc.

In *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, the constitutionality of the act was sustained and it was held that the tax was not imposed upon the property of the corporation nor upon its franchises irrespective of their use in business, but that it was imposed (p. 145)—

> "upon the *doing* of corporate or insurance business and with respect to the carrying on thereof," and that it was essentially "a tax upon the *doing* of business with the advantages which inhere in the peculiarities of corporate or joint stock organizations."

It was carefully pointed out that the measure of the tax was not limited to income "received from property *used* in business," but on the contrary the

tax was for the "*doing* of business," to wit, *any* business, and that the amount of the tax should be determined by the income "received not only from property used in business, but from *every* source" (p. 146).

Therefore if a corporation does *any* business, no matter how small, it is subject to the tax; and the fact that the tax may be large because of a large income derived from property *not used* in business is wholly immaterial. It is *the doing* of business *at all* which creates the liability to the tax.

Again, this court very carefully pointed out that the tax was (pp. 151, 162)—

> an excise upon the particular privilege of doing business in a corporate capacity, *i. e.*, with the advantages which arise from corporate or quasi-corporate organization * * *. The requirement to pay such taxes involves the exercise of privileges * * *. The tax is laid upon the privileges which exist in conducting business with the advantages which inhere in the corporate capacity of those taxed and which are not enjoyed by private firms or individuals. These advantages are obvious and have led to the formation of such companies in nearly all branches of trade. The continuity of the business, without interruption by death or dissolution, the transfer of property interests by the disposition of shares of stock, the advantages of business controlled and managed by corporate directors, the general absence of individual liability, these and other things inhere in the advantages of busi-

> ness thus conducted, which do not exist when the same business is conducted by private individuals or partnerships. It is this distinctive privilege which is the subject of taxation.

The effect of the decision in *Flint* v. *Stone Tracy Co.* is that if a corporation exercises its privilege to do *any* business in a corporate capacity, no matter how small such business is, it is subject to the tax.

Did the Minehill Co. during the years 1909 and 1910 exercise "the particular privilege of doing business in a corporate capacity, with the advantages which arise from corporate organization?" Did it have the benefit to any degree of those advantages, such as "the continuity of business, without interruption by death or dissolution, the transfer of property interests by the disposition of shares of stock, the advantages of business controlled and managed by corporate directors, the general absence of individual liability?"

The Government submits that the Minehill Co. did business in a corporate capacity and exercised all of the advantages above enumerated.

What is doing business? It is needless to review the numerous cases in State courts involving what constitutes a doing of business under local taxing statutes. In *Flint* v. *Stone Tracy Co.* this court said (p. 171):

> * * * "Business" is a very comprehensive term and embraces everything about which a person can be employed. Black's Law Dict., 158, citing *People* v. *Commissioners of Taxes*, 23 N. Y. 242, 244. "That which

occupies the time, attention, and labor of men for the purpose of a livelihood or profit." Bouvier's Law Dictionary, Vol. I, p. 273.

We think it is clear that corporations organized for the purpose of doing business, and actually engaged in such activities as leasing property, collecting rents, managing office buildings, making investments of profits, or leasing ore lands and collecting royalties, managing wharves, dividing profits, and in some cases investing the surplus are engaged in business within the meaning of this statute, and in the capacity necessary to make such organizations subject to the law.

THE BUSINESS ENGAGED IN, DONE OR CARRIED ON, BY THE MINEHILL CO.

1. *Stockholders meetings, election of officers, etc.*— The company's charter (§ 4) requires the stockholders to meet annually in November to elect a president and a board of managers, and gives the stockholders power "to do and perform every other corporate act"; and (§ 6) requires "that the president and managers shall meet at such times and places as shall be found most convenient for the transaction of their business." (Laws of Pa., 1827-8, p. 207-209.)

The stockholders of the Minehill Co. meet annually and elect a president and board of managers; and in turn the managers elect a secretary and treasurer, declare dividends, and manage the funds and affairs of the company. (R. 30.)

2. *Declaration of dividends, corporate reports, etc.*—The charter (§ 11) provides that dividends "shall be declared at least twice a year in every year," payable on demand after ten days; and provides (§ 12) as follows:

> That when actual operations shall have been commenced and at the end of every year thereafter there shall be furnished to the legislature an abstract of the account of the company, showing the whole amount of their capital actually paid into the funds of the company, the sums expended, the tolls and other profits accruing within the year and the amount of dividend declared in each year, or the losses sustained, as the case may be, which abstract shall be verified by the oath or affirmation of the president of the company for the time being.

In order to comply with the statutory requirement as to *semiannual* dividends, the lease provided for the rental being paid in *semiannual* installments (R. 22); and accordingly the company has paid semiannual dividends and presumably made the yearly reports to the legislature as required by its charter.

3. *Collection of rentals, revenue, dividends, interest, and management of finances and invested funds.*—The Minehill Co. collects as rental from the Reading Ry. the sum of $126,306 on the first days of January and July in each year; in 1909 it collected $24,471.07 as interest upon its daily bank balances and as dividends upon its contingent fund; ~~it collected $5,977.93 additional in the shape of dividends~~; and in the year 1910 its collections on those accounts were even

larger, aggregating ~~$31,878.37~~ (R. 31, 33, 35). It had to attend to the investment, reinvestment, management, and care of its contingent fund, and its other funds, and generally attend to its fiscal affairs, which, by the sums involved, are manifestly very considerable.

4. *Payment of taxes.*—While the lease requires the Reading Ry. to pay the taxes upon the property itself and the business done thereon, yet, in addition to such taxes, the Minehill Co. paid $24,639.67 taxes in 1909 and $26,103.24 taxes in 1910 (and deducted those amounts from its gross income, R. 32, 35), in respect to its capital stock, rentals, and dividends. Those large sums paid in taxes (and not on its railroad property) evidence that it is in business; and it has to be in business to look after its taxes. Taxes are not imposed on "dead" companies; and the stockholders would not continue paying $25,000 a year in corporate taxes unless there were reciprocally some advantage in maintaining the corporate existence.

5. *Maintenance of offices, clerical force, etc.*—The company constantly maintains an office at 119 South 4th St., Philadelphia, with officers, clerks, books, stock transfer books, etc. The maintenance is *not* merely nominal, for its returns show that it cost the company $5,809.33 in 1909 and $5,770.13 in 1910 for (R. 31, 32, 34)—

> the ordinary and necessary expenses of maintenance and operation of the business and properties of the corporation.

6. *Preservation of corporate franchises, existence, etc.*—The terms of the lease expressly required the Minehill Co. for 999 years to "maintain its corporate existence and organization" and (whenever requested by the Reading Ry.), to "put in force and exercise each and every corporate power and do each and every corporate act which the Minehill Co." might lawfully do.

The purpose of that provision is manifest. It was a recognition of the settled rule of law in Pennsylvania that (while under a properly authorized lease of a railroad the lessee ordinarily possesses the powers and is subject to the duties, liabilities and restrictions conferred and imposed by the charter of the lessor and not those accruing under its own charter, *Penna. R. Co.* v. *Sly*, 65 Pa. 205) certain high prerogative franchises like that of eminent domain do not pass under a lease but are reserved in the lessor and can only be exercised by the lessor, even though the benefit thereof goes to the lessee. In the margin will be found a statement of the law on that subject.[1]

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[1] In Thompson on Corporations, Vol. III, sec. 2516, it is said:

"The power of eminent domain is granted to railroad companies and like quasi-public corporations, is a personal trust, and can not be delegated or transferred, without legislative sanction, to the lessee. The power remains with the lessor, and where its property can not be successfully operated without the acquisition of other property, the lessor may exercise the right of eminent domain for this purpose, even though the main property is leased for the entire life of the corporation and the property sought to be taken will be used solely by the lessee."

In Elliott on Railroads, par. 461, note 91, it is said:

"The execution of a lease does not, ordinarily, confer upon the lessee the franchise to be a corporation nor a franchise to take property under the power of eminent domain; but the legislature may, perhaps, by express and apt words, confer such franchises. Such franchises do not pass under authority conferred in general terms to execute a lease. The general

The Minehill Co., as a part of the consideration for the large rental of $252,612, agreed to keep alive its corporate organization so that it might on demand exercise any of its reserved powers for the benefit of the Reading Ry.

The Minehill Company's charter not only gave it the power of eminent domain to condemn land but also to condemn stone, gravel, and wood (§ 14); it further imposed certain obligations as to maintaining

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authority does not imply that the lessee shall take such high prerogative franchises, although it does imply that the lessee shall have power to do such things as are reasonably necessary to enable it to properly operate the road."

This reserved power was recognized in the recent case of *Snyder* v. *B. & O. Railroad Company*, 210 Penna. 500, in which it was held that the right of a lessor of a railroad to widen its road for additional tracks, and thereby to condemn a dwelling house, was not affected by the fact that the company had leased its right to another company, and that the widening operated for the benefit of the lessee. In his opinion, Mr. Justice Thompson cited with approval the following language from the earlier case of *Glaser* v. *Railroad Company*, 208 Penna. 328:

"The inference that the taking is not for the benefit of the defendant company because its road has been leased to the Baltimore and Ohio is not warranted by that fact. It has been held in every case where the question arose that when the corporate identity of the lessor company was maintained that its statutory powers were continued, although the exercise of them inured partly to the advantage of the lessee company."

Continuing, the court used the following language:

"The contention of the appellants that as the Glenwood Company had leased its railroad and property and owns no cars or motive power that the appropriation of appellants' land was not necessary to increase its facilities for business and transportation is confronted with the findings of the learned trial judge that the company has, by a proper resolution, determined that it is necessary and in addition that as a matter of fact that it did so. The power of the board of directors to determine the necessity of widening and improving is lodged with it, and its action is conclusive, unless fraud or bad faith is shown. As a lessee company operating a road ordinarily furnishes most of the cars and all that is necessary in the conduct of the transportation, a lessor company may deem it necessary to widen its road and improve the leased property in order to meet the demands of the increased business passing over it. In fact, the failure of a lessor company so to exercise its power in certain contingencies might in some

public and private passways to eliminate grade crossings (§§ 17, 18); and it provided for a forfeiture of the charter if the road were allowed to go to decay and become impassable (§ 23).

Therefore, in order for the Minehill Co. to realize the full benefit from its properties, it had to see to it that various continuing duties were performed either by itself or its lessee; and the only way it could

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cases operate as destructive of important rights of a lessee in the operation of the leased property and thus render its lease almost valueless."

A similar holding is reached in regard to the reserved power of the putting into force by the lessor of franchises which were unexercised at the time of the lease. In the case of *Lewis, Receivers of the Reading Railroad Company*, v. *G., N. & P. R. R. Co.*, reported in 16 Phila. 608, it was held that a lessor's unexercised franchise and right to appropriation and construction did not pass, by virtue of a general lease, to its lessees. The following language of Judge Ross is pertinent upon this question (p. 614):

"It is not denied, nor can it be pretended, that the lessees did not acquire the right to run and operate the road, and to all and everything which of necessity was necessarily incident to its running, general operation, and management as an existing road with its then exercised franchise. It could repair tracks, and, within the limits actually appropriated at the time of the demise, construct new tracks; it could build bridges, depots, etc., etc., on the ground appropriated by the lessees, and, in fact, could do everything to promote safety, despatch, security, and public accommodation in conducting business as common carriers over and along the road. It obtained, by the lease, every operating power, every franchise existing and exercised at the time the lease was executed. All this is clear, but it does not follow that the demise passed, or could legally pass, the power to exercise or put in force a franchise, such as a right to appropriate a public easement or private property for its corporate use. In order to acquire a right to exercise such a franchise by a corporate lease there must be legislative authority. This is well settled."

In *Arrowsmith* v. *Nashville, etc., R. Co.*, 57 Fed. 165, the court (Lurton, J.) said:

"* * * An authorized lease, without any exemption clause, absolves the lessor from the torts of the lessee resulting from the negligent operation and handling of trains and the general management of the leased road over which the lessor could have no control. But for an injury resulting from a negligent omission of some duty to the public, such as the proper construction of the road, station houses, etc., the charter company can not, in the absence of statutory authority, discharge itself of legal responsibility."

insure its lessee's performance thereof so as to avoid a forfeiture of its own charter was to keep its corporate existence alive, exercising certain franchises through the medium of the lessee and ready both to retake possession if necessary and to exercise certain other reserved franchises when the lessee desired. The preservation of its franchises for instant use through keeping up its corporate existence and organization was one of the essential terms of the lease and one of the considerations for the rental.

Do the foregoing activities constitute a "doing of business" within the meaning of the corporation-tax law?

If the Minehill Co. is not engaged in business to *any* extent, how are we to designate its activities above set out? If that is not doing business, what is it?

As the tax is imposed upon "the particular privilege of doing business in a corporate capacity, with the advantages which arise from corporate organization," let us see whether the Minehill Co. is enjoying any of those advantages enumerated in *Flint* v. *Stone Tracy Co.* (p. 162; p. 10, *supra*).

(*a*) "*The continuity of the business without interruption by death or dissolution.*" By the preservation of its full corporate organization, this is secured.

(*b*) "*The transfer of property interests by the disposition of shares of stock.*" Its large property interests, represented by $4,210,200 of capital stock with a fixed return of over 6 per cent net thereon, are constantly transferred by the disposition of shares of

stock, to accomplish which it maintains "at its office its stock books for the transfer of its capital stock" and "its capital stock has been bought and sold upon the market and the shares so bought and sold have been transferred upon its said stock books." (R. 31.)

Is it not a very valuable privilege constantly being exercised for the benefit of its shareholders, that their interests in this large property may be transferred by the disposition of shares of stock as personal property, thus preserving the integrity of the investment instead of being a joint tenancy or tenancy in common in the realty under lease?

(*c*) "*The advantages of business controlled and managed by corporate directors.*"—The Minehill Co. stockholders could scarcely manage their interests in any way except through corporate organization. They could not have leased the property to the Reading Ry. except with the stipulation to keep alive their corporate franchise ready for instant use, and they could only keep it alive through the maintenance of corporate organization. The Reading Ry. would not have taken the lease unless the Minehill Co. agreed to keep alive its power of condemnation, which it could only do through its corporate existence; and so the Minehill Co. is deriving a part of its rental from the keeping up of its corporate existence. There could be no unity of action of numerous stockholders save through its board of directors.

(*d*) "*The general absence of individual liability.*"—In addition to the general avoidance of personal

liability which is too obvious to require argument, the shareholders of the Minehill Co. avoided individual liability for a violation of those express duties imposed by secs. 17 and 18 of its charter and for which the company remained liable regardless of its lease.

A further proof that the shareholders of the Minehill Co. are enjoying the advantages of corporate organization—and if they are enjoying *any* advantages thereby, that constitutes a "doing of business" within the meaning of the statute—is found when we consider that although the Reading Ry. pays all the taxes on the property leased and on the business done over the road, yet the Minehill Co. is paying about $25,000 to $30,000 yearly in taxes for the privilege of maintaining its corporate organization.

This is eminently a practical age and we must recognize things as they are. If a lot of shareholders are willing to pay $25,000 a year in taxes rather than surrender their corporate franchise, we may well conclude that the corporation must be "doing" *something* or else they would quickly dissolve and save that large sum in taxes.

The corporate organization is maintained at that heavy cost in taxes and expenses ($30,000 to $35,000 a year) because in that way, and in that way only, could the advantages of the lease be obtained. But the Corporation Tax Law is intended to tax the priv-

ilege of obtaining advantages under corporate organization.

Such is the very essence of the tax.

If the preservation of corporate existence as a going concern was valuable to the Reading Ry. so as to induce it to stipulate therefor in the lease, then that privilege is precisely what the statute was designed to tax. Therefore the company must pay the tax for the privilege of doing those things which induced the shareholders to maintain it as a going concern.

As (in addition to the rentals coming in semi-annually) the Minehill Co. has large *invested funds* from which it derives a revenue of about ~~$30,000~~ $24,500 a year, is it not evident that the shareholders consider it advantageous to maintain the corporate organization to manage their investment rather than to divide the funds out or to endeavor to manage them as joint owners?

Again, as the property might be thrown back on the hands of the Minehill Co., they deem it desirable to maintain the organization with a large contingent fund on hand rather than to have to rely upon an assessment on joint owners to raise working capital if they had to take back the property.

But are not those advantages the very essence of corporate form, which is the precise thing the statute intends to tax?

SECOND POINT.

The present case is controlled by the various real estate cases decided in Flint v. Stone Tracy Co., 220 U. S. 107; and it is not controlled by Zonne v. Minneapolis Syndicate, 220 U. S. 187.

I.

In the *Corporation Tax Cases* (*Flint* v. *Stone Tracy Co.*, 220 U. S. 107) there were several bearing a close analogy to the case at bar. The court thus disposed of them (220 U. S. 169–171):

> It is especially objected that certain of the corporations whose stockholders challenge the validity of the tax are so-called real estate companies, whose business is principally the holding and management of real estate. These cases are No. 415, *Cedar Street Company* v. *Park Realty Company;* No. 431, *Percy H. Brundage* v. *Broadway Realty Company;* No. 443, *Phillips* v. *Fifty Associates;* No. 446, *Mitchell* v. *Clark Iron Company;* No. 412, *William H. Miner* v. *Corn Exchange Bank;* and No. 457, *Cook* v. *Boston Wharf Company.*
>
> In No. 412, *Miner* v. *Corn Exchange Bank,* the bank occupies a building in part and rents a large part to tenants.
>
> Of the realty companies, the Park Realty Company was organized to "work, develop, sell, convey, mortgage, or otherwise dispose of real estate; to lease exchange, hire, or otherwise acquire property; to erect, alter, or improve buildings; to conduct, operate, manage, or lease hotels, apartment houses, etc.; to make and carry out contracts in the manner

specified concerning buildings, * * * and generally to deal in, sell, lease, exchange, or otherwise deal with lands, buildings, and other property, real or personal," etc.

At the time the bill was filed the business of the company related to the Hotel Leonori, and the bill averred that it was engaged in no other business except the management and leasing of that hotel.

The Broadway Realty Company was formed for the purpose of owning, holding, and managing real estate. It owns an office building and certain securities. The office building is let to tenants, to whom light and heat are furnished, and for whom janitor and similar service are performed.

The Fifty Associates are operating under a charter to own real estate with power to build, improve, alter, pull down, and rebuild and to manage, exchange, and dispose of the same.

The Clark Iron Company was organized under the laws of Minnesota, owns and leases ore lands for the purpose of carrying on mining operations, and receives a royalty depending on the quantity of ore mined.

The Boston Wharf Company is operating under a charter authorizing it to acquire lands and flats, with their privileges and appurtenances, and to lease, manage, and improve its property in whatever manner shall be deemed expedient by it, and to receive dockage and wharfage for vessels laid at its wharves.

What we have said as to the character of the corporation tax as an excise disposes of the contention that it is direct, and therefore requiring apportionment by the Constitution. It remains to consider whether these corporations are engaged in business. "Business" is a very comprehensive term and embraces everything about which a person can be employed. Black's Law Dict., 158, citing *People* v. *Commissioners of Taxes*, 23 N. Y. 242, 244. "That which occupies the time, attention, and labor of men for the purpose of a livelihood or profit." Bouvier's Law Dictionary, Vol. I, p. 273.

We think it is clear that corporations organized for the purpose of doing business, and actually engaged in such activities as leasing property, collecting rents, managing office buildings, making investments of profits, or leasing ore lands and collecting royalties, managing wharves, dividing profits, and in some cases investing the surplus, are engaged in business within the meaning of this statute, and in the capacity necessary to make such organizations subject to the law.

Of the *Motor Taximeter Cab Company Case*, No. 432, the company owns and leases taxicabs, and collects rents therefrom. We think it is also doing business within the meaning of the statute.

An examination of the records in several of the cases discloses even more clearly how closely analogous they are to the present case.

In No. 415 the Park Realty Co. had no assets except the Hotel Leonori—

> which said real property is, and at all the times hereafter mentioned was, leased for a term of 21 years to one Charles Leonori at the specified annual rental of $55,000, which said lease expires Sept. 30, 1914. * * * That said Park Realty Co. is engaged in no other business except the management and leasing of the real property aforesaid and derives no other or further income except from the rental of its said real property aforesaid, and has no assets except said real property, and the income therefrom. (Record, p. 3.)

The Minehill Co. is surely engaged in business as much as (and indeed far more than) the Park Realty Co., for the Minehill Co. not only owns real estate and has leased it (as did the Park Realty Co.), but it has many other assets from which it derives an income of ~~$30,000~~ $40,000 a year, and it has certain continuing obligations to the public which it must see are performed or forfeit its charter; whereas the Park Realty Co. had no surplus assets to manage and no special obligations to the public to keep it alive.

In No. 432, *Lacroix* v. *Motor Taximeter Cab Co.*, the cab company was owner of 43 taxicabs, and it—

> leases all of them for a stated and agreed rental to a single customer, the Renault Taxi Service, a corporation organized and existing under the laws of the State of New York and doing business in said State. The defendant

> company is engaged in no other business whatever and its entire income is exclusively derived from the rental of said vehicles as aforesaid. (Record, p. 2.)

In No. 446, *Mitchell* v. *Clark Iron Co.*, the iron company leased its ore lands to other parties to work and develop, and received royalties thereon as rent. The brief of the Solicitor General (p. 66) thus stated the Government's view as to why the company was taxable:

> The ore lands "have been leased to other parties or corporations *for the purpose of carrying on mining operations* thereon and taking out and removing iron ore" (Rec., 3); and therefore the lease contemplated, and doubtless directly required, mining operations through which the company gets an income "*on a royalty basis upon the iron ore mined and removed*" from the lands (Rec., 3). As the company's lease of the lands requires mining operations and those operations are done in substantial part for its benefit, because it receives a royalty dependent upon the ore mined, and indeed the property is being necessarily consumed in the course of the mining operations, a business evidently exists. In fact, the company's charter estops it to contend otherwise.

That view was sustained.

The Minehill lease affirmatively required the Reading Co. to "maintain and efficiently operate" the leased premises, and it would seem that as the business of running the railway was kept up by the lessee

operating under the lessor's powers (which powers the lessor in turn kept alive, and could only keep alive, by maintaining its corporate existence), the lessor was engaged in business as much as was the Clark Iron Co.

The Government submits that as the Minehill Co. is operating under its charter, with all of its powers intact, it is doing business just as truly as were the various other companies above mentioned which had in one form or another leased their properties and were living on the income therefrom.

II.

The lower courts held that there was no essential difference between this case and *Zonne* v. *Minneapolis Syndicate*, 220 U. S. 187.

In that case a corporation owning a tract of real estate leased it for 130 years at an annual rental of $61,000, and then amended its articles of incorporation so as to limit its powers as follows (p. 190):

> The sole purpose of the corporation shall be *to hold the title* to the westerly one-half of block 87 of the town of Minneapolis, now vested in the corporation, subject to a lease thereof for a term of one hundred and thirty years from January 1, 1907, and, *for the convenience of its stockholders, to receive*, and *to distribute* among them, from time to time, *the rentals* that accrue under said lease, and the proceeds of any disposition of said land.

It owned no other property whatever; it derived no other income whatever; it had no obligation out-

standing to maintain its existence nor to exercise any powers.

Upon the facts thus disclosed, this court *might* reasonably have held that the mere fact of existing as a corporation for the purpose of holding title and distributing the rent annually to the stockholders was a doing of business; and indeed such was the view advanced in the Solicitor General's brief (p. 4).

But this court did not see fit to go that far and accordingly held that the company had parted with the control and management of its property; "had practically gone out of business in connection with the property and had disqualified itself from any activity in respect to it;" that its sole authority was to receive and distribute the rentals or the proceeds of any sale of the land if made; and therefore this court said (p. 191):

> We are of opinion that the corporation was not doing business in such wise as to make it subject to the tax imposed by the act of 1909.

It remains now for this court to say whether the Minehill Company is, in its opinion, in the same attitude as the Minneapolis Syndicate. It is simply a question on which side of the line this court thinks it should be placed.

It is certain, however, that the doctrine of the *Zonne* case will have to be considerably extended in order to include the case at bar. For example: (1) the Minneapolis Syndicate owned *no* property save the leased land, whereas the Minehill Co. owns probably $700,000 of securities on which it is col-

lecting the income, with the necessity of investing, reinvesting, and generally managing such securities; (2) the Minneapolis Syndicate derived *no* income save from the rental which it distributed to its stockholders immediately, whereas the Minehill Co. derives an income of about $30,000 from outside sources, keeps a deposit in bank, receives and collects interest on such deposit, all of which requires corporate attention, action, and judgment, care to select solvent banks, and to make arrangements for receiving interest on bank balances, etc.; (3) the Minneapolis Syndicate, so far as the record showed, paid *no other* taxes, whereas the Minehill Co. pays some $25,000 a year taxes and $5,000 expenses for corporate maintenance; (4) the Minneapolis Syndicate had *disqualified itself* by law from any corporate activity, whereas the Minehill Co. *preserved intact* all its corporate powers and franchises subject only to the lease, and some of them at least were reserved, as, for example, the power of condemnation, and of investment and reinvestment of its funds; (5) the Minneapolis Syndicate was relieved from any further obligation as to the property, whereas the Minehill Co. remained under active and continuing obligations to the public, which could not be gotten rid of except by corporate death, which was the one thing its stockholders desired to avoid.

The Government submits that the Minehill Co. is in a far different position from a corporation whose *corporate power* is absolutely limited to the *naked holding of title* and distribution of rentals.

So far from being limited by amendment, the *corporate power* of the Minehill Co. has not been altered or diminished by one iota. It has corporate power to operate a railroad and at any time may be called upon again to do so; it has corporate power to lease its road, always remaining responsible for its obligations to the public, and at the present time it is engaged in the business of maintaining its reciprocal rights and obligations under this lease, of investing and safeguarding its property, of lending its cooperation to the railroad which is still conducted in accordance with a charter power.

The situation bears no analogy to a corporation which has no powers except the power of holding title (a fact which by its terms negatives the constitutional application of this tax), and which receives its profits as a result of operations which have no business relation whatever to any such powers. For all that concerns the Minneapolis Syndicate its property may remain idle and it still receive the stipulated rent. But the moment the Reading Ry. ceases to operate the Minehill road that moment the Minehill Co. no less than the Reading Railroad fails in a public duty, the lease is broken, and the Minehill Co. is called upon to protect its charter by again actively operating the road which had theretofore been operated for its benefit by its tenant.

The opinion below was based upon the assumption that the Minehill Co. had "in fact gone out of business by the direct permission of the State legislature and is now living upon its income," and that "the

Reading Ry., and not the plaintiff, is doing the corporate business originally entrusted to the plaintiff, *and presumably is also being taxed for carrying it on.*" The court also significantly adds: "It seems hardly possible that both corporations can be taxed in respect of transporting the same freight and the same passengers."

The court erroneously *assumes* that the Reading Ry. is paying a tax on the business now sought to be taxed by the Government, but as a matter of fact, by the express terms of the Corporation Tax Law, the Reading Ry. is allowed to deduct from its gross profits the amount it pays in rentals to the Minehill Co., and so wholly *escapes* tax upon the $252,612 paid to the owners of the road, with the result that the court below has created an anomalous condition of both lessor and lessee *entirely escaping* from taxation on $252,612 of income. The court was clearly in error in supposing that the Government sought to tax both corporations "in respect of transporting the same freight and the same passengers," and in seeking to avoid this supposititious result the court has wholly destroyed the tax as to either.

The court was in error both in its facts and in its reasoning when it argues that because the plaintiff *"has no longer the power to operate a railroad—that being the only kind of corporate business it was created to transact"*—this fact conclusively demonstrated that it cannot be considered as still *engaged in business.*

In the first place, the Minehill Co. has not, like the Minneapolis Syndicate (*supra*), *parted with any power*

whatever; in the second place, it was empowered by its charter not only to operate, but also *to lease* its road. Each form of activity would be equally in pursuance of its charter or statutory rights. At most but a reasonable dividend could be expected, and if the stockholders were of opinion that this dividend could be as safely secured and the public obligations of the corporation under its charter as efficiently carried out by a carefully guarded lease under statutory authority, involving many reciprocal obligations between lessor and lessee, and the ever-present possibility of the retaking of the active conduct of the road and involving further the maintenance of corporate activity to safeguard the plaintiff's rights to discharge its responsibilities and to invest its funds, it is submitted that we have here, in a very real sense, the doing of a corporate business "originally entrusted to the plaintiff," quite as much as the alternative of actually conducting the road.

In this connection it is of the first importance to note that the tax in question is not imposed upon *the operation of a railroad,* but rather upon the mere *doing of business in corporate capacity.* If the corporation is doing such business in pursuance of a charter power, it is quite immaterial whether or not the business done involves at any particular time an actual operation of a railroad. *The tax is directed to the corporation and not to the railroad,* and if one feature of the corporation's permissible business activity is in relation to the making, safeguarding, and maintaining of its public responsibilities through its

charter and statutory prerogative of leasing, this activity quite as completely as any other subjects the corporation to the corporation tax.

The situation is wholly different from that involved in the various internal revenue special tax laws where a tax is imposed specifically upon the manufacture of a certain article. In *such* case it is the character of some specific and carefully defined business which Congress has in mind, and the tax is imposed specifically upon the carrying on of such particular and specific business and not upon the *general business activity* of the person or corporation by which it is carried on. For instance, the act imposing a tax upon rectifiers of distilled spirits (sec. 4, act March 1, 1879, 20 Stat. 327) specifically provides that rectifiers of distilled spirit shall pay a tax of a certain amount, and thereafter proceeds with a precise and elaborate definition of the word "rectifier." The same is true with regard to the special tax on brewers and the special tax on manufacturers of stills (R. S., 3244, as amended). The oleomargarine act (R. S., 3242b, sec. 4, act August 2, 1886, 24 Stat. 209, as amended by section 2 of the act of May 9, 1902, 32 Stat. 193) provides that manufacturers of oleomargarine shall pay $600, and proceeds with an elaborate definition of a manufacturer; while the penal section (R. S., 3242b, sec. 4, act August 2, 1886, 24 Stat. 209) provides that "every person *who carries on the business of* a manufacturer of oleomargarine without having paid the special tax therefor" shall be subject to a certain penalty. These illustrations might be mul-

tiplied to a considerable extent, but those above given sufficiently serve to indicate the marked distinction between a tax imposed upon the doing of a *specific* business and a tax imposed upon the doing of business as a corporation.

CONCLUSION.

The Minehill Co. may or may not be in the *railroad* business, but it is certainly doing business of *some* kind, else it would not be managing its funds, collecting $30,000 dividends, investing and reinvesting its surplus assets, paying $5,000 a year in salaries and office expenses, and $25,000 in taxes, for the mere privilege of corporate *idleness*.

In its last analysis this court must determine for itself in the light of the principles which controlled it in *exempting* the Minneapolis Syndicate, whether such a lessor as the Minehill Co. is or is not doing business within the meaning of the statute.

The case should be reversed.

WM. MARSHALL BULLITT,
Solicitor General.

1 OCT., 1912.

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In the

Supreme Court of the United States

[redacted]

WM. McADOO, Collector of Internal Revenue,

Petitioner

vs.

MINE HILL AND SCHUYLKILL HAVEN RAILROAD COMPANY,

Respondent

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit

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Brief for the Mine Hill and Schuylkill Haven Railroad Company

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ELI KIRK PRICE

Counsel for Respondent

INDEX

IN THE

Supreme Court of the United States

October Term, 1912. No. 670

WM. McCOACH, COLLECTOR OF INTERNAL REVENUE
Petitioner

vs.

MINE HILL AND SCHUYLKILL HAVEN RAILROAD COMPANY
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE MINE HILL AND SCHUYLKILL HAVEN RAILROAD COMPANY

STATEMENT OF THE CASE

The Mine Hill and Schuylkill Haven Railroad Company sued William McCoach, Collector of Internal Revenue, to recover certain taxes with penalties and interest assessed by the collector against the railroad company for the years 1909 and 1910, under the United States corporation special excise tax of 1909. The statement of claim averred that the defendant had made formal claim for payment of such taxes and had informed the plaintiff that in default of payment, collection would be made by distraint and sale of the plaintiff's property; that the plaintiff therefore paid the taxes under protest and subsequently filed a claim for refund; that,

after consideration of the claim for refund, the Commissioner rejected the claim and the defendant so notified the plaintiff; that the plaintiff's franchises and property had, prior to the year 1909, been leased for 999 years to the Philadelphia and Reading Railway Company, which operates the property; and that the plaintiff had not, during the said years, been engaged in business, and was, therefore, not taxable. The defendant filed an affidavit of defence setting up that, in spite of such lease, the plaintiff was and is engaged in business within the meaning of said tax act. A rule was entered for judgment for want of a sufficient affidavit of defence.

The sole question was whether the Mine Hill and Schuylkill Haven Railroad Company was engaged in business during the period for which the tax was assessed and within the meaning of the Act of Congress of August 5, 1909.

The Circuit Court for the Eastern District of Pennsylvania held that the Mine Hill Company was not so engaged in business, and therefore made the rule absolute and entered judgment for the company. The Circuit Court of Appeals for the Third Circuit affirmed this judgment. The Government contends that the judgment should be reversed and the rule discharged.

THE FACTS

It appears that the defendant in error is a quasi-public corporation, which was originally chartered by the Legislature of Pennsylvania in 1828, for the purpose of constructing and operating a railroad for the carriage of passengers and freight. (Record, p. 30 and *infra*, p. 19.) For years it carried on the business for which it was incorporated (Record, p. 30). Under the authority of certain Pennsylvania statutes (passed in 1861 and 1870 and printed on pages 21 and 22, *infra*) the road is now leased to the Philadelphia and Reading Railway Company. The original lease was

made in 1864 (Record, p. 25). After the last receivership and reorganization of the Reading, the present lease was made. It is dated December 31, 1896. Its term is 999 years. The rental is $252,612 per year. And the lease covers all the Mine Hill's franchises (other than the franchise of being a corporation), rights, powers and privileges and all its property, including real estate and "personal property of every kind" (Record, p. 22). It purports to except property included in the "annexed Schedule A", but no such schedule was annexed and no property was by its terms excepted from the lease. It appears, however, from the tax returns made for the years 1909 and 1910 (attached to the collector's affidavit of defence and made part thereof), that the Mine Hill has accumulated a contingent fund and maintains a bank account upon which it collects "interest," that its annual maintenance expenses are nearly $6000, and that it has to pay taxes to the Commonwealth of Pennsylvania (Record, pp. 31-5). The tax paid is the capital stock tax. The affidavit of defence in one place calls the income from the contingent fund "dividends." But this is merely a general averment and must be read in the light of the more particular statement (above referred to) that this income is interest. The actual fact is that the fund is invested in conservative bonds. It appears that the Mine Hill's expenses for maintenance and taxes exceed the sum of its interest on its bank account and its income from its contingent fund. These facts are the basis of the statement on the cover of the brief for the Government that the Mine Hill is "managing large amounts of surplus invested funds," and the statements that it continues to "manage its finances" (p. 1), that it is "left in full possession, ownership and control of all its assets except the railroad, real estate and rolling stock" (p. 5), and that it collects annually over $24,000 as dividends on its stock holdings in other companies (p. 6).

ARGUMENT

The nature of the tax imposed by the act of August 5, 1909, is no longer open to question.

As pointed out by the Government, this Court has clearly held that the statute imposed a *"special excise tax * * * not upon the franchises of the corporation irrespective of their use in business, nor upon the property of the corporation, but upon the doing of corporation or insurance business and with respect to the carrying on thereof * * * the tax is not payable unless there be a carrying on or doing of business in the designated capacity, and this is made the occasion for the tax measured by the standard prescribed. The difference between the acts"* (that is to say, the act in question and the Income Tax Act, held to be unconstitutional in the Pollock case) *"is not merely nominal, but rests upon substantial differences between the mere ownership of property and the actual doing of business in a certain way." Flint vs. Stone Tracy Co.*, 220 U. S. 144, 145 and 150.

Having in mind the substantial distinction thus clearly indicated by this Court, the question in the present case reduces itself to this: whether the Mine Hill stockholders, in their corporate capacity, are mere landlords—owners, that is, of a property from which they derive an income, or whether they are actually engaged in doing business within the meaning of the act.

It is conceded that if the Mine Hill had never leased its property and was operating the railroad which it was chartered to build and run, it would be taxable in respect of the business thus being done by it. In that event, the net income derived by it from the use of its property in business would be the measure of the tax. It must, however, likewise be conceded that the Mine Hill has not in fact retained its property and franchises (other than its franchise to exist), but has leased them both, with legisla-

tive consent, to the Reading Railway for nine hundred and ninety-nine years, and that the lessee is now exercising the leased franchises, operating the road and paying a fixed rental to the Mine Hill. More specifically, therefore, the question in the case is whether the expression "doing of business," as used in the act, is, in the case of a railroad, intended to apply to the railroad business, or whether it also applies in the same case to what the corporation is doing when it has lawfully aliened its railroad and exists merely to receive and, from time to time, distribute among its stockholders the consideration for the alienation.

The District Court and the Circuit Court of Appeals unhesitatingly answered this question by saying that the railroad activity of the corporation was the only thing which Congress sought to tax. The respondent now contends that there was no error in the decision below. We submit, first, that the judgment sought to be impeached is altogether sound on principle, and second, that its entry was a necessary consequence of the decision of this Court in *Zonne vs. Minneapolis Syndicate*, 220 U. S. 187.

1. *On principle, the doing of the things now being done by the Mine Hill is not a doing of business within the act.*

The presentation of the case for the Mine Hill requires merely the statement of a few fundamental and familiar principles.

Before the lease to the Reading, the Mine Hill stockholders, in their corporate capacity, had only two classes of rights. In the first place, there was the right to have a common name, to hold and enjoy common property, to maintain a corporate organization, and, generally, to have the various privileges resulting from "the franchise to be a corporation." In the second place, there was the franchise to *do* something with the corporate organization and with the common property, and that something, in the present case, was to run a railroad.

When the Legislature of Pennsylvania, by the Acts of 1861 and 1870, empowered railroads to make leases, it thereby authorized the Mine Hill to part for a longer or shorter time with its franchise to do and to retain nothing but its franchise to be. The legislative authority thus conferred was not an authority to part with one franchise to do and substitute another. The legislative enactments were not passed to enable railroad stockholders to suspend the railroad business and, while retaining the power to resume it at a future time, to engage in some other business in the interval. After the lease, the legal situation was the same as it would have been had the legislature merely amended the Mine Hill charter by striking out the power to run the railroad and authorizing the corporation to make the best disposition it could of its property. In such a case, had the railroad sold its property on credit, and provided for the receipt of the consideration in instalments, no one would contend that such a method of liquidation constituted a doing of business. The franchise to be would have been retained and exercised, but only to the extent necessary to carry out the plan of alienation.

The circumstance that in the case before the Court the alienation was for a twelvemonth short of one thousand years, instead of perpetual, is really not a differentiating circumstance, except on one point. Instead of treating the successive instalments as principal, the alienor, in the case before the Court, is justified in treating them as income. Whether the alienation is for a thousand years or in perpetuity, the important fact is this: that the income thus received is an income from property and not from business; and the act taxes only the latter. It is at this point that the argument for the Government goes astray. The learned Solicitor-General seems to have overlooked the distinction referred to at the beginning of this brief, and to have lost sight of the decision of this Court in *Pollock vs. Farmers' Loan & Trust Co.*, 158 U. S. 601 (1895). In that case it was settled by this Court once for all that a tax on the in-

come from real estate is a tax on the real estate, and that a tax on the income from personal property is a tax on that personal property; and that such a tax, as being a direct tax, must be apportioned among the States according to representation. And yet it appears to be contended on the part of the Government that the mere corporate ownership of leased property and the receipt of rental under the lease is taxable as if the owner were engaged in business. If this argument were sound as applied to the present case, it might have been used effectively to convert the income tax of 1894 into an indirect tax on the theory that everybody in receipt of an income was engaged in the "business" of collecting and spending it.

Indeed, the Government attempts to create the impression that the Mine Hill is engaged in the business of being "a financier." Now it is true that the Mine Hill has its contingent fund and bank deposits, and receives interest thereon. But even if, as the Government argues, the Mine Hill were receiving "dividends on stocks in other corporations," that would not constitute a doing of business. If the act in question does not apply to a corporation which merely receives income from property leased and used in business by the lessee and not by the lessor, the act does not and cannot apply to a corporation which has divested itself of all property, save a contingent fund, and all power to do business, and which merely receives income from the lease and from stock investments. In either case, to apply the act would be to make the tax an income tax—a direct tax. That it is necessary to invest, reinvest and manage the contingent fund, is merely an assumption. All we know is that interest is received on this contingent fund. But the fact that the investments might be changed would make no difference. As was pointed out in the case of *Smith vs. Anderson*, L. R. 15, Ch. Div. 247, no one would think of speaking of trustees under a marriage settlement or any other deed of trust, with powers of investment and rein-

vestment, as conducting a business in exercising their trusteeship.

It is difficult to see how the Government can avoid the admission that an idle rich man living on the ground rent of a large estate is not engaged in business; but it is argued that the case of a corporation is different for some reason. It is said that the corporation elects officers and pays clerks and the capital stock tax, and that it, therefore, cannot be dead; and it is argued that if the corporation is not dead it must be—not alive merely—but conducting a business. And it is argued that the Mine Hill would not pay so much for the privilege of idleness and therefore must be engaged in business. These arguments lose sight of the facts that it may be desired by men to keep alive a corporation which is not in business, and that there are in existence thousands of corporations which conduct no business whatsoever. If the tax law in question applied to the privilege of such corporate existence, it would impose a tax not upon the use of property in business, but upon the franchise to exist. Indeed it appears that the Government now contends that such is the nature of the tax, for on page 19 of its brief it says "the Corporation Tax Law is intended to tax the privilege of obtaining advantages under corporate organization." And on page 9 the Government quotes from the opinion of the Court in Flint vs. Stone Tracy Co. (*supra*) with respect to the advantages of doing business in corporate form—"continuity of the business without interruption by death or dissolution, the transfer of property interests by the disposition of shares of stock, the advantages of business controlled and managed by corporate directors, the general absence of individual liability," etc. And on pages 10, 17 and 18 the Government argues that because the Mine Hill stockholders enjoyed these privileges, the corporation is subject to the tax. It is conceived, however, that the language of the Court has been misunderstood by the Government. The Court was speaking of a corporation

engaged in business, and was pointing out that, because of these privileges or advantages, a corporation engaged in business may be subject to a special excise tax *with respect to the doing of such business*. It was, of course, not intimated that the enjoyment of such advantages as continued existence, transfer of shares, the election of directors and officers, and absence of individual liability, constitutes a doing of business or subjects the corporation to the tax. On the contrary, the Court was careful to point out that neither property as such, nor corporate privileges as such, are within the act, but only the doing of business by a corporation. Franchises are a kind of property as much as real estate. If the act of 1909 had imposed a tax upon franchises as such, apart from their use in business, it would have been a tax upon property—a direct tax—and, because the tax was not properly apportioned among the States, the act would have been unconstitutional.

In an effort to make it appear that the receipt of income under a lease constitutes a doing of business, the Government refers to the real estate companies' cases argued and decided with Flint vs. Stone Tracy Co. Those were all cases in which the corporate charter showed that the managing, leasing and selling of property was the purpose which had led the associates to incorporate. The making of leases as a means of exploiting property was one of the corporate objects. The right to deal in real estate by lease or sale was a consequence of the franchise to do. If a corporation is chartered to manage and make sales or leases of real estate, and is so engaged, of course it is doing the business for which it was formed and exists. As was decided in the Zonne case (hereinafter discussed), it does not follow that, because a corporation is doing that for which it exists, it is doing business within the meaning of the act in question. If the activity is the managing and renting of real estate for profit, then to engage in that activity is a doing of business; and it was so held, in the cases referred to.

It was in reference to them that this Court said in the Zonne case, *"We have held in the preceding cases that corporations organized for profit under the laws of the State, authorized to manage and rent real estate, and being so engaged, are doing good business." etc.* But the real estate companies' cases are not authority for the proposition that a corporation chartered to operate a railroad, but which (pursuant to authority from the State) goes out of business by means of a practically perpetual lease, and thus divests itself of all its railroad and all authority to operate it, can ever be taxed for doing business with its properties and franchises. It is significant that in no one of the real estate companies' cases did their counsel make the argument that the corporation had gone out of business. And the reason was twofold: first, the companies had not gone out of business, but were engaged in the business for which they had been chartered; and second, even if the companies had gone out of business, they dared not plead this fact as an excuse for not paying the tax, because the result would have been the forfeiture of their charters for nonuser. Neither had the Mine Hill Company the right to go out of business but for the passage of the acts of 1861 and 1870. But these statutes in effect gave the stockholders the choice between continuing to do the business which they were incorporated to do and withdrawing from business and living on the income from their property leased to others. They chose the second alternative, and they are not now engaged in business.

As if forced to the admission that the Mine Hill is itself no longer in business, the Government seems to contend that the running of the railroad by the lessee is somehow to be treated as if it were the doing of the lessor's business by the lessee. It is as if a retired capitalist had rented a building to a merchant and it were to be asserted that by reason of the receipt of rental he was himself engaged in the business carried on by the tenant upon the demised premises. Such a contention is based on a mis-

taken conception of the relation of lessor and lessee. The relation does not at all resemble the relation of principal and agent. The latter is a commercial relationship; the former is purely a property relation with a feudal origin. The landlord has no rights whatever in respect to the tenant's business, and is subject to no liabilities growing out of it. True it is that the landlord may not be able by making a lease to divest himself of certain liabilities incident to the ownership of fixed property. But liabilities of this class give him no power of control over the business, and, while the tenant's earnings may in fact be the source from which the rental is derived, the accruing of the rental is not dependent upon the fact of earnings and the landlord's right to be paid depends entirely upon the tenant's covenant to pay him.

The Mine Hill, therefore, is not itself engaged in business and is in no legal sense interested in the business carried on by the lessee.

2. *The judgment now sought to be impeached was a necessary consequence from the decision of this Court in Zonne vs. Minneapolis Syndicate,* 220 *U. S.* 187 (1910).

In that case it was squarely decided that to be a corporate landlord is not equivalent to doing business. The Government, however, attempts to distinguish the Zonne case at the outset by pointing out that the corporation there under consideration was a purely private corporation, whereas the case at bar involves a quasi-public corporation. It is true that the former could lease its property. The latter could not without special authority. But when that special authority was given, there was no longer any difference. The State of Pennsylvania excused the Mine Hill Company from its public duty to operate its railroad. And even if it still owes a duty to the public to see that the road is run (which it does not) that is not equivalent to running the road. If the Reading were to cease to operate the leased road, that would be a breach of the lease and the Mine Hill Com-

pany might retake its road and franchises and operate. It would then be taxable under the act. But we are concerned only with the present situation. And it is to be borne in mind that, even in case of default by the Reading, the Mine Hill Company need not operate the road. The franchise to operate might be forfeited, but the lessor might elect to suffer the forfeiture and continue to collect the rental from the lessee.

If the irrelevant difference between strictly private and quasi-public corporations is laid aside, it becomes quite impossible to distinguish the case at bar from the Zonne case. There, as here, the corporation sought to be taxed had leased all its property (in that case for 130 years, in our case for 999 years) and simply existed to receive and distribute the rental until the lease should be terminated. It is said that in the Zonne case the corporation had *disqualified* itself from engaging in business by an amendment of its charter. It is true that in that case, at the time of the lease the corporation amended its charter so that it thereafter existed merely for the purpose of holding title to the property as landlord, collecting the rental, distributing it to its stockholders, etc. Of course the reason for this amendment was that otherwise the corporation would have ceased to exercise its franchises — ceased to perform the functions for which it was formed—and its charter could have been forfeited in *quo warranto* proceedings. But it must be borne in mind that it was open to the corporation again to amend its charter at the termination of the lease. The corporation might even have acquired additional property during the continuance of the lease and might have amended its charter so as to do business with the property thus acquired. In the case at bar, the Mine Hill had equally disqualified itself from doing business when, acting under legislative authority, it divested itself of its franchises to run or operate its railroad properties in the carriage of passengers and freight for a profit. Even if it were to desire to acquire property to operate another railroad, it

could not do so. It lacks the franchises either to acquire or operate any other property. In the Zonne case the limitation imposed by the amendment was significant because it helped to explain the nature of the corporate enterprise in which the stockholders intended thereafter to engage; and because it indicated that they did not contemplate engaging in business. After the stockholders had determined to retire from business and had evidenced their determination by an amendment which made such retirement legal, the holding of title as landlord did not constitute a doing of business. In the case at bar the fact that, pursuant to authority, the lessor had divested itself of all its franchises to do business, is equally persuasive that it is not doing business. It has equally disqualified itself from doing any business. And the stockholders have equally indicated that they do not intend to operate a railroad. Pursuant to law, the Mine Hill has divested itself of all its corporate powers save the powers to exist as a moneyed man of leisure, and that is all that it is doing. It does not affirmatively appear that the Minneapolis syndicate used a bank account as the means of distributing the rental in the shape of dividends. It doubtless did so, but the point is insignificant. It does not affirmatively appear that the Minneapolis syndicate paid taxes. It doubtless did so, unless owners of real estate in Minnesota are not subjected to taxes. But mere liability to property taxation does not show that a man or a corporation is engaged in business. As pointed out by the Circuit Court and the Circuit Court of Appeals, there is no significance in the fact that the Mine Hill may retain the power of eminent domain. It does not appear that the Mine Hill has exercised such power since the original lease was made in 1864. When and if it does exercise it, it will be time enough to question whether such exercise constitutes a doing of business within the act in question.

Having failed to distinguish this case from the Zonne case on any other ground, the Government makes a final effort at distinction by referring again to the Mine Hill's

contingent fund. As already pointed out, however (*supra*, p. 7), this is a distinction in fact without a difference in law. The contingent fund is not property embarked in business and yielding a profit. It is merely property owned and producing an income. The result in the Zonne case would not have been altered had the corporation not merely leased its realty and collected rental, but had likewise bought bonds with its personalty and cut its coupons. It is respectfully submitted that the Zonne decision rules this case.

It remains but to refer to one or two minor points made by the Government.

At the bottom of page 4 and again on page 15 of the Government's brief, it is stated that the Mine Hill maintains its corporate existence and organization not as a convenience to its stockholders, but as part of the consideration for the lease. Of course, the corporate existence and organization is maintained for the convenience of the company's stockholders, but the fundamental reason is that a long term lease cannot exist without the existence of a lessor. The Mine Hill could not make such a lease without maintaining its organization. In other words, the corporate existence and organization is an incident of the lease. So far as the present case is concerned, it has no further or other significance. To exist, is not to engage in business.

On page 5, it is stated that the Mine Hill, *in accordance with its charter requirement* that the stockholders shall annually elect a president and ten managers to *conduct the business of said company* and that such officers shall meet from time to time for the transaction of their *business*, has annually elected officers, and has maintained its organiza-

tion for the transaction of such business. This is not correct. When the charter was granted it was, of course, contemplated that the corporation should conduct a railroad business, as for a time it did. When the State of Pennsylvania later permitted the corporation to go out of business and it did go out of business, the situation changed. Since the lease, the maintenance of the corporate organization has not been for the purpose of the conduct of the business for which the company was formed—to wit, the operation of a railroad—or any other business, but in order that the corporation may exist as a lessor. In some sense the officers of a literary society are elected to conduct its business. But such society would not be engaged in business within the meaning of the act of 1909. Of course, as already said, the corporate existence requires the payment of the expenses incident thereto; and the lease necessitates the distribution of the rental to the stockholders in the form of dividends. But, as was held in the Zonne case, these things are not "doing business."

On page 30, criticism is made of the statement of the Circuit Court that "It seems hardly possible that both corporations can be taxed in respect to transporting the same freight and the same passengers." It is submitted, however, that this language of the Circuit Court is not open to the criticism made of it. As the Circuit Court held, if the Mine Hill were taxable, it would be because of the transportation of freight and passengers over its leased line. That is the only business which is being done with the railroad property. The Reading is paying a tax with respect to the transportation of such freight and passengers. It is true that it does not pay as high a tax as it would if it owned the property outright, because it is permitted to deduct from its return the amount of the rental. It does, however, pay a tax on the profit which it makes from the operation of the leased road. The court below has not "created an anomalous condition of both lessor and lessee entirely

escaping from taxation." Congress created this condition and did so intelligently. Congress knew that it could not impose a tax upon property or the income from property; and that the tax act would be sustained as constitutional, if at all, only if it imposed an excise tax with respect to the doing of business. In order to make it clear that such a tax was intended, Congress made the measure of the tax the net income derived from the use of the property. It therefore necessarily permitted the deduction by the taxable corporation of its fixed charges, including rentals.

It is stated on page 31 of the brief on behalf of the Government that the Mine Hill Company "was empowered by its charter not only to operate, but also *to lease* its road." We are at a loss to understand this statement. It is true that in section 2 of the act of March 24, 1828 (P. L. 205, etc., see *infra*, page 19) incorporating the Mine Hill Company, the corporation is authorized to purchase, receive, have, hold and enjoy estates, real, personal and mixed and the same from time to time to sell, mortgage, rent, alien or dispose of, etc. This is the ordinary language in which a railroad corporation is given the power to acquire and hold the property used in its business and when it is no longer needed to dispose thereof. It is well settled, however, that a railroad corporation cannot, without express statutory authority, lease its railroad—that is to say, its railroad property or its franchises to operate such railroad—and that a grant of such authority must be contained in the clearest terms. It can never be implied from the grant of power to acquire and dispose of property necessary for the corporate purposes. See

Oregon Railway Co. vs. Oregonian Railway Co., 130 U. S. 23.

Thomas vs. Railroad Company, 101 U. S., page 83, etc.

Penn Company vs. St. Louis, etc., Railroad, 118 U. S. 309.

Van Steuben vs. Central Railroad, 178 Pennsylvania 372.

Pittsburg, etc., Railroad vs. Bedford, etc., Railroad Co., 81½ Pa. 104.

Stewart's Appeal, 56 Pennsylvania 422.

Vol. 33 of the Encyclopædia of Law and Procedure (title, Railroads), page 391.

Indeed it is conceded on page 2 of the Government's brief that the lease was "entered into pursuant to legislative authority (Laws 1861, p. 410; Laws 1870, p. 31)." This is, of course, the fact. It was because railroads in Pennsylvania have not charter authority to execute leases of their franchises and railroad properties that the Acts of April 23, 1861, and February 17, 1870, were passed, permitting the lease of connecting lines; and it was pursuant to those enabling statutes, as admitted in the collector's affidavit of defence (see page 30, record), that the lease in question was executed.

In conclusion it is submitted that, both upon the authority of the Zonne case and upon principle, the Mine Hill is not engaged in business within the meaning of the act of August 5th, 1909. That act imposes a tax upon the doing of business, not upon the franchises or privileges of a corporation apart from their use in the conduct of business, and not upon property or income from property as such. The Mine Hill merely exists as a landlord with a contingent fund from which it receives interest in addition to its income from the rental. It has no capital embarked

in any enterprise for gain and no authority to conduct any business. Its mere receipt of income does not bring it within the act. And it is therefore submitted that the judgment should be affirmed.

GEORGE WHARTON PEPPER,
For the Mine Hill and Schuylkill Haven Railroad Company.

WM. B. BODINE, JR.,
ELI KIRK PRICE,
Of Counsel.

APPENDIX

An Act

To incorporate the Mine Hill and Schuylkill Haven Railroad Company, approved March 24, 1828

Section 1 provides for the appointment of commissioners to receive subscriptions and regulates the subscriptions.

Section 2. "And be it further enacted by the authority aforesaid, That when two hundred and fifty shares or more of the said stock shall be subscribed, and the sum of five dollars paid on each and every share, the commissioners, or a majority of them may certify to the governor under their hands and seals the names of the subscribers, and the number of shares subscribed by each and the sums paid thereon, whereupon the governor shall by letters patent under his hand and seal of the commonwealth, create and erect the subscribers, and if the subscription be not full at the time, then also those who shall thereafter subscribe to the number of shares, as aforesaid, into a body politic and corporate in deed and in law, by the name, style and title of the Mine Hill and Schuylkill Haven railroad company, and by the same name the subscribers shall have perpetual succession and be able to sue and be sued, implead and be impleaded, in all courts of record and elsewhere, and to purchase, receive, have, hold and enjoy to them and their successors, lands, tenements and hereditaments, goods chattels and all estate, real, personal or mixed, of what kind or quality soever, and the same from time to time, to sell, mortgage, grant, alien or dispose of, and to make dividends of such portion of the profits as they may deem proper, and also to make and have a common seal, and the same to alter or renew at pleasure, and also to ordain, establish and put in execution, such by-laws, ordinances and regulations, as

shall appear necessary and convenient for the government of the said corporation, not being contrary to the constitution and laws of the United States, or of this commonwealth, and generally to do all and singular, the matters and things which to them it shall lawfully appertain to do, for the well being of the said corporation, and the due management and ordering the affairs of the same; Provided, That nothing herein contained shall be considered as in any way giving to the said corporation any banking, mining, manufacturing or trading privileges whatsoever, or any other liberties, privileges or franchises but such as may be necessary or incident to the making of the said rail road: Provided further, That said company shall at no time, hold or possess any land for the purpose of carrying on the coal trade, or for any other purpose than the construction of the said rail road, or for toll houses, or other necessary works."

Sections 3, 4 and 5 provide the manner of the original organization, for the making of by-laws, the annual meeting of stockholders and the manner of voting.

Section 6 provides for the meeting of the managers and the appointment of engineers and other employees.

Section 7 provides for the stock certificates.

Section 8 deals with default in the payment of stock subscriptions.

Section 9 deals with assessments.

Section 10 provides for treasurer's bond.

Section 11 regulates the declaration of dividends.

Section 12 provides for the furnishing to the Legislature of an abstract of the account of the company.

Section 13 provides for the fixing of the route of the railroad.

Section 14 deals with the entry upon land.

Section 15 provides that the railroad may be double tracked, etc.

Section 16 deals with the manner of assessing damages for land taking.

Section 17 deals with the manner of construction of the railroad.

Section 18 deals with the construction and maintenance of causeways.

Section 19 regulates suits.

Section 20 deals with lateral railroads.

Section 21 makes the railroad a public highway for the transportation of all commodities and fixes the rate of charges.

Section 22 provides penalties for injuries to the railroad.

Section 23 fixes a time for the commencing and completion of the work.

Section 24 provides for the increase of the capital stock.

Section 25 provides that the Legislature may revoke, alter or annul the charter.

NOTE.—There was some supplementary legislation, but it had no reference whatsoever to the sale, lease or other disposition of any property of any sort.

AN ACT

Relating to certain Corporations

SECTION 1. Be it enacted by the Senate and House of Representatives of the Commonwealth of Pennsylvania in General Assembly met, and it is hereby enacted by the authority of the same, That it shall and may be lawful for any railroad company created by and existing under the laws of this commonwealth, from time to time to purchase and hold the stock and bonds, or either, of any other railroad company or companies, chartered by or of which the road or roads is or are authorized to extend into this commonwealth; and it shall be lawful for any railroad compa-

nies to enter into contracts for the use or lease of any other railroads, upon such terms as may be agreed upon with the company or companies owning the same, and to run, use and operate such road or roads in accordance with such contract or lease: *Provided*, That the roads of the companies so contracting or leasing shall be directly, or by means of intervening railroads, connected with each other.

Approved — The twenty-third day of April, Anno Domini one thousand eight hundred and sixty-one.

An Act

To authorize railroad companies to lease or become lessees, and to make contracts with other railroad companies, corporations and parties

Section 1. Be it enacted by the Senate and House of Representatives of the Commonwealth of Pennsylvania in General Assembly met, and it is hereby enacted by the authority of the same, That it shall and may be lawful for any railroad company or companies, created by or existing under the laws of this commonwealth, from time to time to lease or become the lessees, by assignment or otherwise, of any railroad or railroads, or enter into any other contract with any other railroad company or companies, individuals or corporations, on such terms and conditions as may be agreed upon, whether the road or roads embraced in such lease, assignment or contract, may be within the limits of this state, or created by or existing under the laws of any other state or states; and any railroad company or companies of this commonwealth may agree to guarantee, in whole or in part, the payments and covenants of any such lease, assigned lease or contract: Provided however, That such road or roads, so embraced in any such lease, assignment, contract or guarantee, shall be connected either directly, or

by means of intervening line, with the railroad or railroads of said company or companies of this commonwealth so entering into such lease, assignment, contract or guarantee, and thus forming a continuous route or routes for the transportation of persons and property: Provided further, That the provisions of this act shall in no wise, nor by any construction whatever, apply to the Pittsburg and Connellsville Railroad Company.

Approved—The seventeenth day of February, Anno Domini one thousand eight hundred and seventy.

8

Supreme Court of the United States.

OCTOBER TERM, 1912.

No. 670.

WILLIAM McCOACH, Collector of Internal Revenue,
Petitioner,

against

MINE HILL AND SCHUYLKILL HAVEN RAILROAD COMPANY.

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE.

R. PARMALEE PRENTICE,
CHARLES P. HOWLAND,
Counsel for Albany & Susquehanna Rail Road Company.

GEORGE WELWOOD MURRAY,
Of Counsel.

C. G. BURGOYNE, 72 to 76 Spring Street, New York.

Supreme Court of the United States.

OCTOBER TERM, 1912.

No. 670.

WILLIAM McCOACH, Collector of Internal Revenue,
Petitioner,

AGAINST

MINE HILL AND SCHUYLKILL HAVEN RAILROAD COMPANY.

And now come Charles P. Howland and E. Parmalee Prentice and show to the Court that they are counsel for and represent in this behalf the Albany and Susquehanna Rail Road Company, a corporation organized in the year 1851 under the laws of the State of New York, and authorized by said laws to build a railway from the City of Albany to the City of Binghamton in said State; that the said corporation built the railway as authorized and thereafter in 1870 leased the same, together with all other property of said Rail Road Company to the Delaware and Hudson Company in perpetuity; that Cyrus Durey now is, and for more than three years last past has been, Collector of Internal Revenue in the State of New York, and that for the years 1909, 1910 and 1911 the said Durey assessed and collected from the Albany and Susquehanna Rail Road Company a corporation tax under the provisions of Section 38 of the United States

Revenue Act of 1909, and that the amount of said tax so assessed and collected was measured by the entire rental paid by the Delaware and Hudson Company under the provisions of its said lease.

And your petitioners show further that the Albany and Susquehanna Rail Road Company asserts and asserted that it is not engaged in business and is not subject to the provisions of said statute; that the said Company paid said tax under protest and thereafter brought suit against the Collector for the recovery of all amounts so paid; that on the 12th day of April, 1912, judgment was rendered in favor of the said Rail Road Company and against the said Collector by the United States District Court for the Northern District of New York; that the Government has appealed said case to the Circuit Court of Appeals for the Second Circuit, and that the case is now pending before said court; that the question involved in the said suit of the Albany & Susquehanna Rail Road Company is now involved in this above entitled cause now pending in this Court, and that the decision to be rendered in this case will control the decision of the Circuit Court of Appeals in the case to which the Albany & Susquehanna Rail Road Company is party upon the question whether said Susquehanna Company is doing business, and is subject to taxation under the provisions of said statute of the United States.

Your petitioners therefore pray that they may be permitted on behalf of the Albany & Susquehanna Rail Road Company to file an intervening brief in this the above entitled case.

E. Parmalee Prentice,
Charles P. Howland,
Counsel for Albany & Susquehanna Rail Road Company.

George Welwood Murray,
Of Counsel.

9

Supreme Court of the United States.

OCTOBER TERM, 1912.

No. 670.

WILLIAM McCOACH, Collector of Internal Revenue,
Petitioner,

against

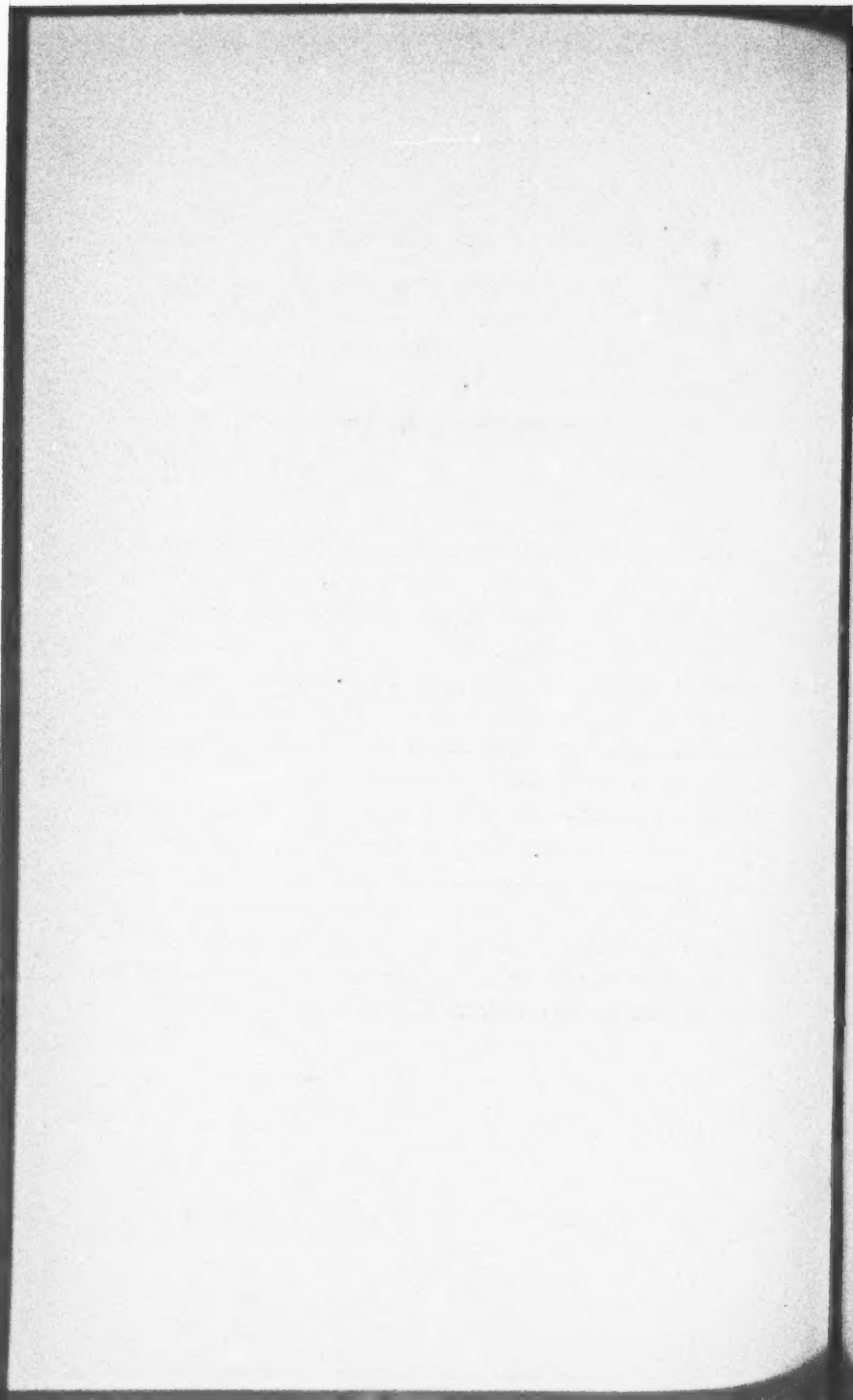
MINE HILL AND SCHUYLKILL HAVEN RAILROAD COMPANY.

BRIEF FILED BY LEAVE OF COURT.

E. PARMALEE PRENTICE,
Amicus Curiae.

GEORGE WELWOOD MURRAY,
CHARLES P. HOWLAND,
Of Counsel.

C. G. BURGOYNE, 72 to 78 Spring Street, New York.



SUBJECT INDEX.

Table of Cases.

Supreme Court of the United States.

OCTOBER TERM, 1912.

No. 670.

WILLIAM MCCOACH, Collector of Internal Revenue, Petitioner,

AGAINST

MINE HILL AND SCHUYLKILL HAVEN RAILROAD COMPANY.

INTERVENING BRIEF OF ALBANY AND SUSQUEHANNA RAIL ROAD COMPANY, FILED BY LEAVE OF COURT.

The decision of the question whether the Mine Hill Company is subject to the Federal corporation tax will probably control the decision of a number of cases now pending in lower courts, among others the cases in which the Rensselaer and Saratoga Railroad, the West Shore Railroad, the Morris and Essex Railroad and the Albany and Susquehanna Rail Road have recovered judgments against Collectors of Internal Revenue. All of these cases have been appealed by the Government and are now pending before the United States Circuit Court of Appeals of the Second Circuit; and because the facts in these several cases are such as throw great light upon the main

question, we have asked leave on behalf of the Albany and Susquehanna Rail Road Company, to intervene and file the present brief.

The entire property of the Albany and Susquehanna Company was on February 24th, 1870, leased to the Delaware and Hudson Company in perpetuity, the lessor corporation continuing to maintain its corporate existence as a muniment of title for the lessee, and for this purpose having a nominal office, which during the last five years or more has been appointed at the address of its present counsel. By the terms of the lease the Delaware and Hudson Company pays all taxes and has endorsed upon all Susquehanna bonds and stock certificates its direct agreement with bondholders and stockholders guaranteeing payment of interest and dividends. Until very recently these direct payments absorbed the entire rent paid by the lessee. No payment has been made directly to the Susquehanna corporation until by a recent reduction of interest charges a comparatively small balance of rental arose which is now paid directly to the Susquehanna Company, and by it is divided among its stockholders. When the condition out of which this saving arises shall cease to operate, the occasion for this distribution will cease also. The Susquehanna Company has outstanding bonds to the amount of $7,000,000 and stock to the amount of $3,500,000. Under the Federal statute, in order to determine the net income subject to taxation, interest charges can be deducted upon bonds to the amount only of the capital stock. Upon the ground, therefore, that the receipt and distribution of this balance of rental constituted a "doing of business," the Collector has assessed and collected a tax not only upon the balance of rental which constituted the Susquehanna Company's sole corporate income, but also has taxed this small corporate income for all dividends paid by the lessee directly to the holders of its guaranties, allowing a deduction only of interest charges upon bonds to the amount of the Company's capital stock. The

result is that the Susquehanna Company has been taxed upon its income, upon its stockholders' income, and upon its fixed interest charges accruing upon a sum equal to its capital stock.

The History of the Federal Statute.

The corporation tax is the outcome of an extraordinary situation which for a time seemed to threaten a breach between two great departments of government.

In Pollock vs. Trust Company, 157 U. S., 429; 158 U. S., 601, this Court held that taxation upon income derived from real estate or from invested personal property was direct taxation within the meaning of the constitutional provision that representatives and direct taxes shall be apportioned among the people of the several States according to their respective numbers.

The decision has been the subject of much public discussion and of widely varying opinion, the debate chiefly centering upon the effect to be given to previous decisions of this Court. Were the intention of the framers of the Constitution alone to be considered, the rule of the Pollock case would probably have been accepted without serious question, but the problem was not so simple. There were decisions of this Court announcing a contrary interpretation of the Constitution, and many persons believed that these decisions were too firmly established to be overruled. One of the dissenting justices put these considerations very forcibly when he said:

> "I cannot resist the conviction that the opinion and "decree of the court in this case virtually annuls its "previous decisions in regard to the powers of Con- "gress on the subject of taxation, and is therefore "fraught with danger to the court, to each and every "citizen, and to the republic. * * * The funda- "mental conception of a judicial body is that of one "hedged about by precedents which are binding on the

> " court without regard to the personality of its mem-
> " bers. Break down this belief in judicial continuity,
> " and let it be felt that on great constitutional ques-
> " tions this court is to depart from the settled conclu-
> " sions of its predecessors, and to determine them all
> " according to the mere opinion of those who tempo-
> " rarily fill its bench, and our Constitution will, in my
> " judgment, be bereft of value and become a most dan-
> " gerous instrument to the rights and liberties of the
> " people."
>
> *Pollock vs. Farmers' Loan & Trust Co.*, 157 U. S., 650-652.

There was a time in 1909 when some of these apprehensions, so gravely stated, seemed within measurable distance of realization.

In that year a deficiency in the national income made additional taxation necessary, and to meet this situation there was introduced into Congress, and it was proposed to enact, a general income tax, of the same character as that which in the Pollock case was held by this Court, a direct tax not within Federal power.

Such a course of legislation seemed to many persons, both in and out of Congress, to threaten the stability of judicial institutions and even of government itself.

> Remarks of Senator Root, Cong. Rec. 61st Cong., 1st Sess., Vol. 44, p. 4003.
> Senator Aldrich, Cong. Rec., Vol. 44, p. 3931.
> Senator Dixon, Cong. Rec., Vol. 44, p. 3941.

For this reason some method of compromise was sought which should leave the decision in the Pollock case unquestioned by Congress, while at the same time offering a method of taxation to meet the requirements of the Federal revenue.

The basis of the compromise finally adopted was found in the statement of Mr. Chief Justice FULLER that the income tax decision did not question the power of Congress to impose excise taxes upon occupations (158 U. S., 635),—a suggestion

which bore its first fruit in 1898 when Congress levied upon all persons, firms or corporations engaged in the business of refining sugar or oil, and in respect to the "carrying on or doing the business," a certain excise tax based upon income in excess of $250,000 per annum. This statute was sustained in Spreckels Sugar Refining Co. vs. McClain (192 U. S., 397), and out of this case and the statement of the Chief Justice came the Federal tax upon the business of corporations,—valid because not resting upon the property or franchises of the company and therefore not direct, and, nevertheless, so far as it went, amounting to an income tax, for it was to be measured by income.

The substitution of such a tax, in place of the general income tax then proposed by Congress, was suggested by the President in his Message of June 16th, 1909, in which, after referring to the deficit in national income and to the proposed re-enactment of the tax held unconstitutional in the Pollock case, the President said:

> "The decision of the Supreme Court in the income "tax cases deprived the National Government of a "power which, by reason of the previous decisions of "the court, it was generally supposed that Government "had. It is undoubtedly a power the National Gov- "ernment ought to have. * * * I shall, therefore, "recommend to the Congress that both Houses, by a "two-thirds vote, shall propose an amendment to the "Constitution conferring the power to levy an income "tax upon the National Government without appor- "tionment among the States in proportion to popu- "lation.
>
> "This course is much to be preferred to the one "proposed of reenacting a law once judicially declared "to be unconstitutional. For the Congress to assume "that the court will reverse itself, and to enact legis- "lation on such an assumption, will not strengthen "popular confidence in the stability of judicial con- "struction of the Constitution. It is much wiser

"policy to accept the decision and remedy the defect "by amendment in due and regular course. * * *

"Second, the decision in the Pollock case left "power in the National Government to levy an excise "tax, which accomplishes the same purpose as a cor- "poration income tax and is free from certain objec- "tions urged to the proposed income tax measure.

"I therefore recommend an amendment to the tariff "bill, imposing upon all corporation and joint stock "companies for profit, except national banks (otherwise "taxed), savings banks and building and loan associa- "tions, an excise tax measured by two per cent. on the "net income of such corporations. This is an excise "tax upon the privilege of doing business as an arti- "ficial entity, and of freedom from a general partner- "ship liab lity enjoyed by those who own the stock.

"I am informed that a 2 per cent. tax of this char- "acter would bring into the Treasury of the United "States not less than $25,000,000.

"The decision of the Supreme Court in the case of "Spreckels Sugar Refining Company vs. McClain (192 "U. S., 397), seems clearly to establish the principle "that such a tax as this is an excise tax upon privilege "and not a direct tax on property, and is within the "federal power without apportionment according to "population."

Cong. Rec., Vol. 44, Part 3, p. 3344.

Both of these recommendations were adopted. The Constitutional Amendment which the President advised was framed and has now been approved by so many States that its final incorporation in the Constitution is probably a question of but a short time. The decision in the Pollock case may, therefore, be considered as definitely accepted by Congress and by the States; its doctrine that in 1909 the Federal Government could levy a property tax only according to the rule of apportionment will soon be written into the Constitution itself.

The history of the tax legislation which the President ad-

vised is brief. The message on this subject was referred by the Senate to the Finance Committee, which later reported as an Amendment to the pending Revenue Act a bill which had been "drawn by the Attorney-General of the United States after conference with the President and with the junior Senator from New York."

Cong. Rec., vol. 44, Part 4, p. 3937.

This bill, which, with some amendments not material to the present subject, later became Section 38 of the Revenue Act of 1909, provides:

> "That every corporation * * * organized for profit and having a capital stock represented by shares * * * and engaged in business * * * shall be subject to pay annually a special excise tax with respect to carrying on or doing business by such corporation * * * equivalent to one per centum upon the entire net income over and above five thousand dollars, received by it from all sources during such year, exclusive of amounts received by it as dividends upon the stock of other corporations * * * ".

This bill, it is at once evident, accomplishes, as to all corporations which are engaged in business, the result which as to these corporations would have been accomplished by an income tax. This indeed was the expressed purpose of its authors. As Senator Root said "the corporation tax saves all of the income tax that is constitutional and can be enforced" (Cong. Rec., Vol. 44, p. 4005).

To corporations not in business the statute has no reference, for Congress was levying an indirect tax upon occupations not a property tax.

The line between these two classes of taxes may be fine but it is none the less real, existent and imperative, for a tax upon property or franchises is a direct tax,

Pollock vs. Trust Company, 158 U. S., 601,

and if the Federal corporation tax be direct it is unconstitu-

tional, for it is not imposed in accordance with the rule of apportionment.

On the other hand, this Court has long held that Congress may impose excise taxes upon occupations, and that these taxes being indirect are subject only to the rule of uniformity.

Now the Federal corporation tax is so measured that it collects the same amount which a direct tax upon income would collect, and on this ground the opponents of the measure asserted that it was unconstitutional. They denied the existence of a distinction between a direct tax on incomes and an excise tax measured in amount by income but levied on business, and argued that the proposed bill in substance made it a business to receive income and taxed that income—an argument which was produced in the Senate, and effectually answered, three several times. The burden seems now to have fallen upon the Solicitor General who seeks to demonstrate the soundness of the constitutional objection by collecting the tax from corporations not engaged in any other business than the receipt of income, and in support of his position uses arguments formerly employed by those who attacked the statute. It is doubtless true, as has been said, that the distinction between direct property taxes, and indirect occupation taxes may, in some instances be fine. The argument of the Solicitor General would abolish it. This was brought out with great distinctness during the argument of Senator Cummins. The corporation tax, he urged, was in its nature a property tax and when Senator McCumber interrupted the argument, and, referring to the "slight differentiation between a tax upon property and a tax upon the right to do business," asked whether a general income tax could not be based upon this "refinement," Senator Cummins replied:

> "Mr. President, the Senator from North Dakota, has touched the very heart of things as he usually does. We could just as well say in our proposed amendment that the tax was levied upon the right to receive and

spend incomes. We could say that it was a tax levied upon the business of receiving income. * * *

"Assuming for the moment that this is not a tax upon property, that it is not a tax upon the incomes of corporations, and therefore the incomes of stockholders in corporations, but assuming that it is a tax upon something else, what is it upon? * * * I know that those who will attempt to defend the validity of this tax will say that it is not an income tax and will say that it is not a property tax. * * * The real truth is that this is not a tax on business, because corporations carry on the same kind of business that individuals do and that copartnerships do. It is not a tax on business. I think it is a tax on property. But if it is not a tax on property or on incomes, it is a tax upon the right to do business in a corporate capacity. There is no wit of man that can relieve the proposed law of that construction if it is not a tax on incomes. And if that interpretation be put upon it there is not a lawyer in the Senate who will insist that it can be done."

Cong. Rec., Vol. 44, Part 4, pp. 3976, 3977.

The reply was that differentation between the tax upon property and a tax upon doing business was not slight, and the argument was pressed by Senator Sutherland, who asked:

"Does the Senator from Iowa think that the act of recieving interest for example upon a bond, or the act of receiving rent from a landed estate, can be in any way properly described as a business."

To this Mr. Cummins was obliged to answer:

"I am not prepared to say that it can be."
Cong. Rec., Vol. 44, Part 4, p. 4206.

"I think," said Mr. Root "there is altogether an unnecessary amount of trouble on the subject, and I do not think I can make the words clearer by any explanation of mine. I think we all know what the carrying on of business means" (Cong. Rec., Vol. 44, p. 4035).

The same question again arose when it was considered whether corporate income derived either from real estate or from invested personal property could be included in measuring the amount of the proposed tax.

In Spreckels Sugar Refining Co. vs. McClain, 192 U. S., 397, it appeared that the corporation owned a wharf from which it derived a considerable rental, also that it received interest upon bank deposits and dividends from stock owned by it in other companies. The excise tax in that case was laid upon the business of refining sugar, and under the circumstances shown, this Court held that the income derived from rental of the wharf could be included in measuring the tax but that the interest on deposits and stock dividends must be excluded. The grounds of these rulings were thus stated in the Senate. As to the inclusion of rental of real estate Mr. Borah said:

> "In the Spreckels case, the corporations owned certain wharves and collected rent from those wharves. It was contended that that * * * came within the income tax decision. Justice HARLAN in writing the opinion in effect said:
>
> > "'The matter is not free from difficulty; but we take the view of it that the holding of the real estate, and the collecting of the rent is incident to the other business of refining sugar; and therefore we will decline to hold it a business by itself.'"
> > Cong. Rec., Vol. 44, Part 4, p. 4026.

On the other hand, the receipt of interest on bank deposits and the acceptance of dividends were not incident to the business of refining sugar and could not be taxed. This was very clearly shown by Senator Sutherland (Cong. Rec., Vol. 44, Part 4, p. 4027) when he quoted from the opinion in the Spreckels case the statement—

> "The gross annual receipts upon which, in excess of a certain amount, the tax was imposed, were, under the

statute, only receipts in the business of refining sugar, not receipts from independent sources. But, clearly, neither interest paid to the plaintiff on its deposits in bank, nor dividends received by it from investments in the stocks of other companies, were receipts in the business of refining sugar." (192 U. S., 416, 417).

The distinction between an occupation tax on business and a tax on income arose a third time in the course of the Senate debates. In rendering his decision in the Income Tax case, the Chief Justice said that only those portions of the statute had been considered which related to the taxation of real and invested personal property, and that the other portion of the statute which imposed an occupation tax had not been passed upon.

"I should like to know," asked Senator Bacon, "what the Senator of New York understands to be the meaning of the words 'invested personal property' in this connection? Of course, we all understand what invested personal property is, but what classification did the Supreme Court have in mind? (Cong. Rec., Vol. 44, Part 4, p. 4035). In other words, what distinguishes the taxation of property which in the first clause of his sentence the Chief Justice mentions as within the condemnation of the Pollock case, from the taxation of property or income as the measure of an occupation tax mentioned in the second clause of his sentence?" To this Senator Root answered—

> "I think there is a clear line between the two kinds
> " of treatment of personal property, and I assume that
> " the court had that line in mind. There may be first
> " an investment in personal property which is not used
> " by the investor, as to which he is passive.
>
> "The purchaser of bonds remains quiescent, and re-
> " ceives the interest from time to time as it accrues and
> " is paid. The lender of money upon bonds and mort-
> " gages does the same, and the lender upon notes does
> " the same. That kind of income which is not associ-

" ated with any activity or any use on the part of the
" owner, I understand to be the income from invested
" personal property which the court had in mind in the
" first part of the clause, while on the other hand, per-
" sonal property is widely used and must be widely
" used in the activities of life. The workman uses his
" tools, the merchant his stock of goods, buying and
" selling and transporting, taking it from the place
" where it is worth but little to the place where it is
" ready for the uses of mankind. The great body of
" the business of life is done by dealing with personal
" property on the basis of real property and that kind
" of investment, the ownership of the tools, the imple-
" ments, the materials used in the activities of business
" life I understand to be the subject of the second part
" of the clause."

Cong. Rec., Vol. 44, p. 4035.

From the whole situation which existed when the corporation tax was framed and enacted, from the nature of the compromise which it embodies as well as from the statement of the Senator who effected this adjustment, these conclusions may be drawn.

1. That Congress did not intend by the corporation tax to question the doctrine of the Pollock case, but that on the contrary, accepting that doctrine and making it the subject of a proposed Constitutional Amendment, Congress sought to levy a tax in accordance with the rule of the Spreckels case.

2. That Congress in so doing acted upon the view that a tax, either upon corporate franchises, or upon the personal or real property of a corporation or upon corporate income would be a direct tax and within the rule of the Pollock case.

3. That the corporation tax is valid and constitutional only when construed as an excise tax upon doing business.

4. That the tax is not levied upon the right to receive and spend income nor upon "the business of receiving income." This was the basis of Senator Cummins' attack upon the bill and if adopted now would present to this Court the situation

which would have arisen had Congress in 1909 enacted a general income tax as proposed.

5. That the words "doing business" must be accepted in their ordinary and natural signification. "I think we all know" said Senator Root "what the carrying on of business means" (Cong. Rec., Vol. 44, p. 4035). It is not receipt of income "not associated with any activity or any use on the part of the owner" but refers to "the great body of the business of life,"—the "activities of business life."

Decisions Construing the Statute.

The Federal corporation tax is imposed "not upon franchises of the corporation irrespective of their use in business, nor upon the property of the corporation, but upon the doing of corporate * * * business and with respect to the carrying on thereof, * * * that is, when imposed in this manner it is a tax upon the doing of business with the advantages which inhere in the peculiarities of corporate or joint stock organizations of the character described."

Flint vs. Stone Tracy Co., 220 U. S., at p. 145.

This interpretation of the law conforms to the nature of the tax as stated by Senator Root in the debate upon the bill. It was the position of Senator Cummins and of others who urged the passage by Congress in 1909 of a general income tax, that the proposed corporation tax was not only, so far as it went, indentical in principle with an income tax, but that it was more objectionable as being unequal in operation. Upon this subject Senator Cummins said:

> "But it will be said * * * that this is not an income tax, it is not a tax upon the corporate franchises, or the right to do business as a corporation, but it is simply a tax upon the business of corporations. Senators, it is not possible that you will pass a law that will

tax the business of corporations and leave untaxed the business of co-partnerships and individuals of the same kind, of the same extent, of the same profit.

"I want to make my meaning perfectly clear. I agree that Congress can impose a tax upon the business of selling dry-goods or manufacturing iron or steel. I agree that it can impose a tax upon the business of refining sugar and oil. I agree that it can impose a tax upon the business of transportation. But when it imposes that tax, it ought to impose it upon all who are engaged in the business whatever it may be. You can select for your law, and you will select, of course, only those kinds of business which, according to your own observation, are best able to bear the tax. That, however, is at your own discretion. But having selected the business that is to be taxed, then all who are engaged in the business must fall within the provisions of your law. If you do not so frame your law, you have encountered, not constitutional difficulties, but you have encountered the vital principle of our social compact. * * * The only uniform thing in the classification of the statute is 'the business of being a corporation,' and when you attempt to tax the business of being a corporation you are taxing the franchise, or the right to exist, and your law is not worth the paper upon which it is written."

Cong. Rec., Vol. 44, p. 3978.

Senator Root, in replying to this argument, justified "the right of the Federal Government to take a class of corporations organized under the laws of the States, and impose a tax upon the business or processes of business of these corporations" on the ground that "the members of corporations are exempt from those consequences of death and bankruptcy which call a halt upon the progress of ordinary business * * * and the interest they have in the corporate property is susceptible of easy transfer and devolution. * * * Who can doubt but that that constitutes an exceedingly valuable and peculiar difference between the conduct of business by

corporations and the conduct of business by private firms and copartnerships.

Cong. Rec., Vol. 44, pp. 4005, 4006.

But the Albany and Susquehanna Rail Road Company is engaged in the conduct of no business except—if we may adopt Senator Cummins' phrase—"the business of receiving the income" of property which was rented over forty years ago. It was authorized by its charter to construct a railroad between definite termini and through designated counties of the State. By the construction of this road it exhausted its corporate power,

Elliott on Railroads, Secs. 923, 930,

and became for all time the owner of a single railroad property. When in 1870 this property was leased under the authority of the New York Act of 1839, the Susquehanna Company abrogated its corporate activity and went out of business. It retained its franchise, partly at the instance of the lessee as a muniment of its title, and partly because the enforcement of the rights created by a lease require a landlord.

Only a small part of the rent is paid directly to the Susquehanna Company for under the guarantees endorsed by the Delaware and Hudson Company upon every share of Susquehanna stock, and upon every bond issued by that Company, the principal part of the rent is distributed directly to Susquehanna stockholders and bondholders. These guarantees are the primary obligations of the Delaware Company,

Pennsylvania Steel Co. vs. New York City R. R. Co., 198 Fed., 762,

which now stands in immediate relations to the stock and bondholders of the Susquehanna Company. The functions which remain for the lessor corporation are therefore merely nominal, and consist in the annual receipt and distribution among its stockholders of a small part of the rent of its prop-

erty. In the case of the Rensselaer and Saratoga Railroad even this function is abrogated and the entire rent is distributed by the lessee.

Is, then, a corporation engaged in business whose corporate function is existence merely, while the lessee distributes the rental arising from the lease of its property? If not, does the fact that the Albany and Susquehanna Company annually receives and distributes among its stockholders a small portion of its rent make such a distinction as will justify a tax upon all the net income distributed to its stockholders and upon an equal amount of its fixed interest charges—for as already stated the bonds of the Susquehanna Company, whose amount was fixed a full generation ago, are double the amount of its capital stock.

So far as this question is concerned, we believe, that as to the business of the lessor corporation, and as to the obligations which it owed to the public and to stockholders there has been a novation; that so far as concerns the business of the corporation this novation was complete, though not absolute and unconditional, being subject to a condition subsequent that the lessee shall make no default. Counsel for the Rensselaer & Saratoga Company, Mr. George B. Wellington, of Troy, presented this subject very clearly on the hearing of that case and we quote from his brief:

> "The dividends paid by the lessee to the stockholders of the lessor are not an income received by the lessor corporation. A corporation and its stockholders are not identical. When a corporation lawfully transfers its property directly to its stockholders, or to a third person for their benefit the consideration to go to stockholders, the legal effect of the transaction is as though there had been a division of assets *pro tanto* among stockholders. Thereafter the legal title to the property transferred vests in the transferee, and any income therefrom becomes the property of the stockholders as individuals. * * * It was said

in Smith vs. Hurd, 12 Met., 385: 'The individual members of a corporation, whether they should all join or each act separately, have no right or power to intermeddle with the property or concerns of the Bank, or call any officer, agent or servant to account, or discharge them from any liability. Should all the stockholders join in a power of attorney to anyone, he could not take possession of any real or personal estate, any security or chose in action; could not collect any debt or discharge a claim, or release damage arising from any default, simply because they are not the legal owners of the property and damage done to such property is not an injury to them.'"

This case was approved in Humphreys vs. McKissock, 140 U. S., 304.

We may perhaps regard it as settled therefore, that the corporation tax cannot be measured by so much of the rental of leased property as is paid by the lessee to stockholders of the lessor, and probably the same argument would apply to the portion of rental paid as interest to bondholders, for here, too, so far as relates to the present question, there has been a novation.

But does not this argument dispose also of the claim that the tax may be imposed upon the portion of the rental, if any, which is paid directly to the lessor corporation. This is the only corporate income, the only money over which it has any control whatever, the only resource out of which it can pay a tax. But the act of receiving that income is not a business—to hold otherwise would place a construction upon the statute which would bring it into conflict with the Pollock case. And if the corporation's activities cannot be taxed unless it receive some corporate income—without regard to the sum which may be paid by the lessee to stockholders of the lessor—it is evident that the features mentioned in the brief of the Solicitor General—the stockholders's meetings, election of officers, preservation of corporate franchises, etc., do not con-

stitute a doing of business—a conclusion which might much more simply have been reached by following Senator Root's method and taking the words of the statute in their common and natural meaning. "I suppose," Senator Root said, "that everybody knows what doing business means." No corporation makes money by stockholder's meetings, election of officers and preservation of franchises—necessary as these and many other acts may be.

This is the view upon which all the courts before whom this question has come have agreed.

United States intervenor vs. New York City Railway Co., 193 Fed., 286.

United States vs. New York Railway Co. (C. C. A), 198 Fed., 774.

Albany and Susquehanna Rail Road Co. vs. Durey, Collector, decided by U. S. Dist. Ct., Northern Dist. of N. Y., April, 1912.

Morris and Essex R. Co. vs. Anderson, Collector, decided by U. S. Dist. Ct., Southern Dist. N. Y., March, 1912.

Mine Hill R. Co. vs. McCoach, 192 Fed., 670; affirmed by Circuit Ct. of Appeals, 3rd Circ., March Term, 1912.

It was evidently not the intention of Congress to tax a corporation unless it were actually carrying on its own business within the generally accepted meaning of those words. As the tax is an excise tax imposed upon the doing of business and not upon the franchise or property of the corporation, not even upon the preservation of the franchise,

Flint vs. Stone Tracy Co., 220 U. S., 107,

the taxation of the business of the lessor and lessee would impose two taxes by the same act upon the doing of the same business. Double taxation sometimes exists, but it is always unfortunate and not often deliberately intended. Double excise taxation upon the same act of doing business imposed by the same municipal authority in a single phrase of a single

statute is so far as we have been able to learn without precedent in the legislative history of taxation. In the present case the Government's interpretation of the statute would often occasion treble, quadruple and multiple taxation, for in the course of railroad consolidations separate railroad properties have often been transferred by successive leases.

There is no difference between the present case and that of Zonne vs. Minneapolis Syndicate, 220 U. S., 187. The Albany and Susquehanna Railroad Company, like the Minneapolis Syndicate, has transferred all its property as a unit for a long term and has become completely passive.

In the Zonne case the articles of incorporation were amended after the lease, but this element was not necessary to the decision that the corporation was not *in fact* doing business. The only corporations taxed by the Act are those carrying on or doing business; and if no business is in fact transacted, it is irrelevant to consider what powers a corporation *may* still exercise under the charter, or what charter powers it may have abdicated. Such abdication concerns solely the internal management of the corporation and the relation of stockholders to the enterprise, while the statute makes the tax dependent upon the fact of doing business and not upon the charter power.

This rule was recently applied by the Circuit Court of Appeals for the Second Circuit to the case of a railway company whose property was in the hands of receivers. In this case there had been no amendment of the charter; the corporate power remained as complete as when the company was first organized. The court said:

> "The act, in all its provisions, clearly contemplates that the tax is to be paid by a corporation which is actually engaged in business as an actively operating concern. It nowhere intimates that the tax can be collected unless the corporation is carrying on the business * * *.
>
> "It is manifest that the functions of the Metropoli-

> tan Street Railway Company, as a corporation, were superseded when all its property was placed in the hands of receivers. * * * It could no longer act in its corporate capacity, it could no longer operate the railroad ; it lost, for the time at least, all dominion over its property. * * * Assuming that net income could arise in such circumstances, and assuming further that Congress could constitutionally levy ' a special excise tax with respect to carrying on the business of such a corporation,' we are clearly of opinion that it has failed to do so under the present act."
>
> United States, intervenor, vs. New York City R. Co., 198 Fed., 774.

But even in respect of charter power the situation of the Susquehanna Company is on all fours with that of the Minneapolis Syndicate in the Zonne case. The railroad which was built in pursuance of the charter powers of the subscribers has been leased, so far as the lessor is concerned, in perpetuity ; and that lease has been construed to transfer to the lessee the right to use the franchises of the leased corporation.

> People *ex rel.* The Delaware & Hudson Co. vs. Commissioners of Taxes, 171 N. Y., 641.

The lessor is therefore in legal contemplation in precisely the same situation as if by an amendment to its charter it were proscribed from doing any business, and its sole function were to protect its rights as lessor under the lease. The railroad franchise of the Albany and Susquehanna Rail Road has actually passed out of its power.

In the Flint case reference is made by the Court to the fact " that certain of the corporations whose stockholders challenged the validity of the tax, are so-called real estate companies, whose business is principally the holding and management of real estate." The Court referred briefly to the facts in these cases, showing that in each case the company was actually engaged in the active management of some corporate property and continued exercise of an active corporate power. The Court concluded (p. 171) :

> "We think it is clear that corporations organized for the purpose of doing business, and actually engaged in such activities as leasing property, collecting rents, managing office buildings, making investments of profits, or leasing ore lands collecting royalties, managing wharves, dividing profits and in some cases investing the surplus, are engaged in business within the meaning of this statute, and in the capacity necessary to make such organizations subject to the law."

By this the Court unmistakably says that corporations organized to lease at retail are engaged in business when they do lease at retail. It is quite another matter when a corporation organized to build and run a railroad, leases all its property in perpetuity, and (in the colloquial phrase) "retires from business."

In all the companies under discussion in the opinion in the Flint case the leasing of property was part of the business for which they were organized; one, for example, was a real estate company owning an office building, which leased suites of rooms to tenants, managed the building, furnished light, heat and janitor service, exerted itself in relating the different suites, as they fell in at various periods, and generally conducted itself as realty or office building companies do. Another similarly conducted a "private" hotel called the Leonori. In every such case the amount of income was directly dependent upon the efficiency of the management and the company in prosecuting this business of managing its properties the company was actively performing the very functions for which it was organized.

E. PARMALEE PRENTICE
Amicus Curiæ.

GEORGE WELWOOD MURRAY,
CHARLES P. HOWLAND,
Of Counsel.

OPINION

McCOACH, COLLECTOR OF INTERNAL REVENUE, v. MINEHILL & SCHUYLKILL HAVEN RAILROAD COMPANY.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 670. Argued January 14, 15, 1913.—Decided April 7, 1913.

The corporation tax is imposed upon the doing of corporate business and with respect to the carrying on thereof and not upon the franchises or property of the corporation irrespective of their use in business. *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 145.

A railway corporation which has leased its railroad to another company operating it exclusively but which maintains its corporate existence and collects and distributes to its stockholders the rental from the lessee and also dividends from investments is not doing business within the meaning of the Corporation Tax Act. *Park Realty Company Case sub Flint* v. *Stone Tracy Co.*, 220 U. S. 171, distinguished, and *Zonne* v. *Minneapolis Syndicate*, 220 U. S. 187, followed.

Quære whether such a corporation would be subject to the tax if it exercised the power of eminent domain or other corporate powers for the benefit of the lessee.

192 Fed. Rep. 670, affirmed.

THE facts, which involve the construction of the provisions of the Corporation Tax Act as to what constitutes doing business by a corporation so as to subject it to the tax, are stated in the opinion.

Mr. Solicitor General Bullitt for petitioner:

The Minehill Company was "engaged in business" and was therefore subject to the Federal corporation tax.

The Corporation Tax Law is intended to tax the privilege of doing business with the advantages of corporate organization. Section 38, act of August 5, 1909; *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 145, 146, 151, 171.

The business engaged in, done, and carried on by the Minehill Company includes stockholders' meetings, election of officers, etc.; declaration of dividends, corporate

reports, etc.; collection of rentals, revenue, dividends, interest, and management of finances and invested funds; payment of taxes; maintenance of offices, clerical force, etc.; preservation of corporate franchises, existence, etc. *Arrowsmith* v. *Nashville &c. R. R. Co.*, 57 Fed. Rep. 165; *Lewis, Receivers, &c.* v. *G., N. & P. R. R. Co.*, 16 Phila. 608; *P. R. R. Co.* v. *Sly*, 65 Pa. St. 205; *Snyder* v. *B. & O. R. R. Co.*, 210 Pa. St. 500; Elliott on Railroads, par. 461, note 91; 3 Thompson on Corporations, § 2516.

The foregoing activities constitute a "doing of business" within the meaning of the Corporation Tax Law. They involve continuity of business without interruption by death or dissolution; transfer of property interests by the disposition of shares of stock; advantages of business, controlled and managed by corporate directors; general absence of individual liability; keeping alive corporate existence; investment and reinvestment of surplus assets.

The present case is controlled by the various real estate cases of *Cedar Street Co.* v. *Park Realty Co.; Lacroix* v. *Motor Taximeter Cab Co.; Mitchell* v. *Clark Iron Co.*, all decided in *Flint* v. *Stone Tracy Co.*, 220 U. S. 107; and it is not controlled by *Zonne* v. *Minneapolis Syndicate*, 220 U. S. 187. There are decided points of difference between the Minehill Co. and the Minneapolis Syndicate.

The lower courts erred in assuming that the Reading Railway was paying taxes upon the $252,612 rental, whereas in fact the Reading Railway was allowed to deduct that amount from its gross profits in determining the net profit upon which it should pay taxes.

Mr. George Wharton Pepper, with whom *Mr. Wm. B. Bodine, Jr.*, and *Mr. Eli Kirk Price* were on the brief, for respondent.

Mr. E. Parmalee Prentice, Mr. George Welwood Murray and *Mr. Charles P. Howland*, by leave of the court, filed a brief as *amici curiæ*.

MR. JUSTICE PITNEY delivered the opinion of the court.

The Minehill & Schuylkill Haven Railroad Co., the respondent herein (called for convenience the Minehill Company), sued the petitioner, who is Collector of Internal Revenue at Philadelphia, to recover certain taxes for the years 1909 and 1910 paid under protest by that company under the Corporation Tax Act of 1909. The United States Circuit Court held that the company was not "engaged in business" within the meaning of the act, and that therefore the taxes had been illegally assessed, and rendered judgment for their recovery. 192 Fed. Rep. 870. The Circuit Court of Appeals affirmed the judgment, and the case comes here upon certiorari.

The facts appear from the plaintiff's statement of claim and the defendant's affidavit of defense, which latter was overruled as insufficient. They may be summarized as follows: The Minehill Company was incorporated by an act of the legislature of the State of Pennsylvania, approved March 24, 1828 (P. L., p. 205), for the purpose of constructing and operating a railroad, with appropriate powers, including the power of eminent domain. Under this charter a railroad was built and for many years operated. Under the authority of general acts of the legislature, approved respectively April 23, 1861 (P. L., p. 410), and February 17, 1870 (P. L., p. 31), the Minehill Company, in the year 1896, leased its entire railroad, with all side-tracks, extensions, and appurtenances of every kind, and all rolling stock and personal property of every description in use or adapted for use in, upon, or about the railroad (excepting some property intended to have been described in a schedule annexed to the lease, but which is not described, no such schedule having been annexed), and also—"All the rights, powers, franchises (other than the franchise of being a corporation), and privileges which may now, or at any time

hereafter during the time hereby demised, be lawfully exercised or enjoyed in or about the use, management, maintenance, renewal, extension, alteration, or improvement of the demised premises, or any of them," unto the Philadelphia & Reading Railway Company for a term of nine hundred and ninety-nine years from January 1, 1897, at a yearly rental of $252,612, that being equivalent to six per centum upon the capital stock of the Minehill Company.

The lessee agreed to keep the road in good order and repair, keep it in public use and efficiently operate it, and return it to the lessor company at the expiration or other determination of the lease. The Minehill Company agreed during the term of the lease to maintain its corporate existence and organization, and that when requested by the lessee it would "put in force and exercise each and every corporate power, and do each and every corporate act which the Minehill Company might now, or at any time hereafter, lawfully put in force or exercise, to enable the Railway Company (the lessee) to enjoy, avail itself of, and exercise, every right, franchise, and privilege in respect of the use, management, maintenance, renewal, extension, etc., of the property demised, and of the business to be there carried on." It was provided that upon default in the payment of the rent reserved, or in the performance of certain other covenants, the lessor might declare the lease forfeited and reënter and repossess the demised premises. The lease further provided that the lessee might, under certain circumstances, abandon certain railway lines, "whenever it shall be found legally practicable to abandon so much of the said lines of railroad, without working a forfeiture or any impairment of the chartered rights and franchises of the Minehill Company as to its railroads, or any part thereof, or without creating any liability on the part of the Minehill Company or the Railway Company, to the public or the Commonwealth, for

the non-user of such portions of the railroad lines." In the event thus provided for the abandoned rails, machinery, etc., are to be sold and the proceeds turned over to the Minehill Company, and the annual rental proportionately reduced.

Pursuant to this lease the entire railroad and all property connected therewith was turned over to the Reading Company, and since then has been operated by that company, and the Minehill Company has not carried on any business in connection with the operation of it. It has, however, maintained its corporate existence and organization by the annual election of a president and board of managers, and this board has annually elected a secretary and treasurer. It receives annually from the Reading Company the fixed rental called for by the lease, and it receives annually sums of money as interest on its bank deposits, and also maintains a "contingent fund," from which it receives annual sums as interest or dividends. And it annually pays the ordinary and necessary expenses of maintaining its office and keeping up the activities of its corporate existence, including the payment of salaries to its officers and clerks. It keeps and maintains at its offices, stock books for the transfer of its capital stock, and this stock is bought and sold upon the market. The annual income from the contingent fund appears to be about $24,000, its annual payments for state taxes about as much, and its expenditures for corporate maintenance about $5,000.

The Corporation Tax Law (act of August 5, 1909, § 38; 36 Stat., c. 6, pp. 11, 112–117), provides:

"That every corporation . . . organized for profit and having a capital stock represented by shares . . . and engaged in business in any state . . . shall be subject to pay annually a special excise tax with respect to the carrying on or doing business by such corporation . . . equivalent to one per centum upon the

entire net income over and above five thousand dollars received by it from all sources during such year, exclusive of amounts received by it as dividends upon stock of other corporations . . . subject to the tax hereby imposed. . . .

"Such net income shall be ascertained by deducting from the gross amount of the income of such corporation, . . . received within the year from all sources, (first) all the ordinary and necessary expenses actually paid within the year out of income in the maintenance and operation of its business and properties, including all charges such as rentals or franchise payments, required to be made as a condition to the continued use or possession of property; (second) all losses actually sustained within the year and not compensated by insurance or otherwise, including a reasonable allowance for depreciation of property, . . ."

In *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, the question of the constitutionality of this act was presented here for decision. Upon the preliminary question of interpretation the court said (pp. 145, 146):

"It is therefore apparent, giving all the words of the statute effect, that the tax is imposed not upon the franchises of the corporation irrespective of their use in business, nor upon the property of the corporation, but upon the doing of corporate or insurance business and with respect to the carrying on thereof, in a sum equivalent to one per centum upon the entire net income over and above $5,000 received from all sources during the year; that is, when imposed in this manner it is a tax upon the doing of business with the advantages which inhere in the peculiarities of corporate or joint stock organizations of the character described. As the latter organizations share many benefits of corporate organization it may be described generally as a tax upon the doing of business in a corporate capacity. . . . The income is not limited

to such as is received from property used in the business, strictly speaking, but is expressly declared to be upon the entire net income above $5,000 from all sources, excluding the amounts received as dividends on stock in other corporations, joint stock companies or associations, or insurance companies also subject to the tax. In other words, the tax is imposed upon the doing of business of the character described, and the measure of the tax is to be the income, with the deduction stated, received not only from property used in business, but from every source."

In discussing the constitutional question, reference was first made to the case of *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429, 158 U. S. 601, which held the income tax provisions of the act of August 27, 1894 (28 Stat., c. 349, pp. 509, 553, § 27, etc.), to be unconstitutional because amounting to a direct tax within the meaning of the Constitution, and because not apportioned according to population as required by that instrument. Attention was called (220 U. S. 148) to the expressions used by Mr. Chief Justice Fuller, speaking for the court in the *Pollock Case*, upon the rehearing, as to the distinction between a tax upon the income derived from real estate and from invested personal property, on the one hand, and an excise tax upon business privileges, employments, and vocations, upon the other. Reference was also made to the interpretation put upon the decision in the *Pollock Case* in *Knowlton* v. *Moore*, 178 U. S. 41, 80, and in *Spreckels Sugar Refining Co.* v. *McClain*, 192 U. S. 397, and it was held (p. 150) that the corporation tax law of 1909 "does not impose direct taxation upon property solely because of its ownership, but the tax is within the class which Congress is authorized to lay and collect under Art. I, § 8, cl. 1 of the Constitution, and described generally as taxes, duties, imposts and excises, upon which the limitation is that they shall be uniform throughout the United States."

In applying this principle to the several cases then *sub judice*—in some of which the validity of the tax was challenged by the stockholders of certain real estate companies whose business was principally the holding and management of real estate—the court dealt, among others (220 U. S. 170), with the Park Realty Co., organized to "work, develop, sell, convey, mortgage or otherwise dispose of real estate; to lease, exchange, hire or otherwise acquire property; to erect, alter or improve buildings; to conduct, operate, manage or lease hotels, apartment houses, etc.; to make and carry out contracts in the manner specified concerning buildings . . . and generally to deal in, sell, lease, exchange or otherwise deal with lands, buildings and other property, real or personal," etc. At the time the bill was filed in that case the business of the Park Realty Company related only to the management and leasing of one hotel. Others of the realty companies that were before the court were engaged in more extensive business transactions. The court held (p. 171):

"We think it is clear that corporations organized for the purpose of doing business, and actually engaged in such activities as leasing property, collecting rents, managing office buildings, making investments of profits, or leasing ore lands and collecting royalties, managing wharves, dividing profits, and in some cases investing the surplus, are engaged in business within the meaning of this statute, and in the capacity necessary to make such organizations subject to the law."

Another case argued and decided at the same time, but separately reported, is *Zonne* v. *Minneapolis Syndicate*, 220 U. S. 187. In this case the court held that the corporation was not doing business in such wise as to make it subject to the tax imposed by the act of 1909, because while originally organized for and engaged in the business of letting stores and offices in a building owned by it, and collecting and receiving rents therefor, it had afterwards

made a lease of all lands belonging to it to certain trustees for a term of 130 years, and then had caused its articles of incorporation, which had been those of a corporation organized for profit, to be so amended as to confine the purpose of the corporation to the ownership of the lands in question, subject to the lease, and "for the convenience of its stockholders to receive, and to distribute among them, from time to time, the rentals that accrue, under said lease, and the proceeds of any disposition of said land." The court said (p. 190):

"The corporation involved in the present case, as originally organized and owning and renting an office building, was doing business within the meaning of the statute as we have construed it. Upon the record now presented we are of opinion that the Minneapolis Syndicate, after the demise of the property and reorganization of the corporation, was not engaged in doing business within the meaning of the act. It had wholly parted with control and management of the property; its sole authority was to hold the title subject to the lease for 130 years, to receive and distribute the rentals which might accrue under the terms of the lease, or the proceeds of any sale of the land if it should be sold. The corporation had practically gone out of business in connection with the property and had disqualified itself by the terms of reorganization from any activity in respect to it."

The precise question presented by the present record is whether the Minehill Company is "doing business" in the sense in which the realty companies concerned in *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 170, were doing business, or had gone out of business in substantially the same sense that the Minneapolis Syndicate had done so.

From the facts as stated above it is entirely clear that the Minehill Company was not, during the years of 1909 and 1910, engaged at all in the business of maintaining or operating a railroad, which was the prime object of its

incorporation. This business, by the lease of 1896, it had turned over to the Reading Company. If that lease had been made without authorization of law, it may be that for some purposes, and possibly for the present purpose, the lessee might be deemed in law the agent of the lessor; or at least the lessor held estopped to deny such agency. But the lease was made by the express authority of the State that created the Minehill Company, conferred upon it its franchise, and imposed upon it the correlative public duties. The effect of this legislation and of the lease made thereunder was to constitute the Reading Company the public agent for the operation of the railroad and to prevent the Minehill Company from carrying on business in respect of the maintenance and operation of the railroad so long as the lease shall continue. And it is the Reading Company, and not the Minehill Company, that is "doing business" as a railroad company upon the lines covered by the lease and is taxable because of it. The Corporation Tax Law does not contemplate double taxation in respect of the same business.

The Government points out that by the terms of the act the Reading Company is allowed to deduct from its gross income the $252,612 paid annually to the Minehill Company for rentals under the lease, with the result that, unless the latter company is held to be "doing business" as a railroad company, both lessor and lessee entirely escape from taxation on $252,612 of income. But an examination of the act shows that this is the precise result intended by Congress. "Net income shall be ascertained by deducting from the gross amount of the income . . . (first) all the ordinary and necessary expenses actually paid within the year out of income in the maintenance and operation of its business and properties, *including all charges such as rentals or franchise payments*, required to be made as a condition to the continued use or possession of the property." The deduction of rentals is not confined

to such as are paid to companies that are subject to the tax imposed by the act; and yet the suggestion that it might be so confined was present in the mind of the draftsman, for below there is a provision for deducting "(fifth) all amounts received . . . as dividends upon stock of other corporations . . . *subject to the tax hereby imposed.*" In short, Congress said, and intended to say, as to rentals paid for the use or possession of property and franchises employed by the lessee company in a business taxable under the act,—Let there be a deduction by the lessee of the amount of such rentals, whether the lessor is within the reach of the taxing scheme or not.

We conclude that the Minehill Company was not taxable with respect to the railroad business.

It should be mentioned that there is nothing in the record to show that during the taxing years in question the company exercised its power of eminent domain, or put in force any other special corporate power, in aid of the business of the lessee. We therefore do not pass upon the question whether, if it should do so, it would be taxable under the act in question. We cannot, however, agree with the contention made in behalf of the Government that because the Minehill Company retains its franchise of corporate existence, maintains its organization, and holds itself ready to exercise its franchise of eminent domain, or other reserved powers, if and when required by the lessee, and ready to resume possession of the property at the expiration of the lease, it is therefore to be treated as doing business, in respect of the railroad, within the meaning of the Corporation Tax Law. As to these matters the case is governed by what was said by the court in *Flint* v. *Stone Tracy Co.*, 220 U. S. 145,—"It is therefore apparent, giving all the words of the statute effect, that the tax is imposed not upon the franchises of the corporation irrespective of their use in business, nor upon the property of the corporation, but upon the doing of corporate or

insurance business and with respect to the carrying on thereof." And again, p. 150,—"The tax is not payable unless there be a carrying on or doing of business in the designated capacity, and this is made the occasion for the tax, measured by the standard prescribed."

There remains to be considered the fact that the Minehill Company has a considerable amount of personal assets known as its "contingent fund," in the form of investments (the amount and particulars are not specified), from which it derives an annual income of about $24,000; that it keeps a deposit in bank, receives and collects interest upon such deposit, and distributes the income thus received, as well as the rentals received from the Reading Company (after payment of expenses and taxes), to its stockholders in the form of dividends.

In our opinion the mere receipt of income from the property leased (the property being used in business by the lessee and not by the lessor) and the receipt of interest and dividends from invested funds, bank balances, and the like, and the distribution thereof among the stockholders of the Minehill Company, amount to no more than receiving the ordinary fruits that arise from the ownership of property. The ground of the decision in the *Pollock Case* was that a tax upon income received from real estate and invested personal property (as distinguished from income received from the transaction of business) was in effect a direct tax upon the property itself, and therefore invalid unless apportioned according to population. In the *Flint Case*, in sustaining the act of 1909 as a tax upon the privilege of doing business in corporate form, against the objection that it includes within its reach the income of real estate and personal property not used in the business and not the subject of taxation, the court said (220 U. S. 163): "The measure of such tax may be the income from the property of the corporation, although a part of such income is derived from property in itself non-taxable,"

And again, after referring to previous decisions (220 U. S. 165): "It is therefore well settled by the decisions of this court that when the sovereign authority has exercised the right to tax a legitimate subject of taxation as an exercise of a franchise or privilege, it is no objection that the measure of taxation is found in the income produced in part from property which of itself considered is non-taxable. Applying that doctrine to this case, the measure of taxation being the income of the corporation from all sources, as that is but the measure of a privilege tax within the lawful authority of Congress to impose, it is no valid objection that this measure includes, in part at least, property which as such could not be directly taxed. . . . The tax must be measured by some standard, and none can be chosen which will operate with absolute justice and equality upon all corporations. Some corporations do a large business upon a small amount of capital; others with a small business may have a large capital. A tax upon the amount of business done might operate as unequally as a measure of excise as it is alleged the measure of income from all sources does. Nor can it be justly said that investments have no real relation to the business transacted by a corporation. The possession of large assets is a business advantage of great value; it may give credit which will result in more economical business methods; it may give a standing which shall facilitate purchases; it may enable the corporation to enlarge the field of its activities and in many ways give it business standing and prestige."

In short, the inclusion of income derived from property in arriving at the measure of the tax to be imposed with respect to the doing of corporate business was sustained largely because the property not used in the business, and the income from such property, have a fair relation to the business itself, and may contribute materially to its proper and economical conduct. But that reasoning furnishes

no support for the contention that the mere receipt of income from property, and the payment of organization and administration expenses incidental to the receipt and distribution thereof, constitute such a business as is taxable within the meaning of the act of 1909. The distinction is between (a) the receipt of income from outside property or investments by a company that is otherwise engaged in business; in which event the investment-income may be added to the business-income in order to arrive at the measure of the tax, and (b) the receipt of income from property or investments by a company that is not engaged in business except the business of owning the property, maintaining the investments, collecting the income and dividing it among its stockholders. In the former case the tax is payable; in the latter not.

And so, upon the whole, we think the court below correctly held that the present case is governed by *Zonne* v. *Minneapolis Syndicate*, 220 U. S. 187, and that the taxes under consideration were unlawfully imposed.

Judgment affirmed.

MR. JUSTICE DAY, with whom concur MR. JUSTICE HUGHES and MR. JUSTICE LAMAR, dissenting.

I am unable to concur in the opinion of the majority of the court. It seems to me that, applying the principles laid down in the *Corporation Tax Cases*, 220 U. S. 107, the Minehill & Schuylkill Haven Railroad Company is a corporation doing business within the meaning of the law and subject to the tax.

We are advised by a brief filed by an *amicus curiæ* that the decision in this case will affect a number of cases now pending, and, owing to its importance as affecting the public revenue, I feel justified in briefly stating the grounds of my dissent.

The corporation tax is imposed under the terms of the

law upon every corporation organized for profit, having a capital stock represented by shares and engaged in business in any State. Every such corporation is subject to a special excise tax with respect to the carrying on or doing of business, equivalent to one per cent. upon the entire net income over and above $5,000 received by it from all sources during the taxing year. This tax, it was held in 220 U. S., was constitutionally imposed, and rests upon the doing of business with the advantages which inhere in the peculiarities of corporate or joint stock organization. As was said in that case, doing business is a very comprehensive term, embracing about everything in which a person can be employed, and the definition of business as "that which occupies the time, attention and labor of men for the purpose of a livelihood or profit" was adopted and approved. As is said in the majority opinion, the precise question in this case is, Was the Minehill Company doing business in the sense in which the term is employed in the law or had it gone out of business in such substantial sense that it was no longer subject to the law?

I do not care to restate the facts which are developed fully in the majority opinion. It therein appears that the Minehill Company, while it has leased its railroad for a term of years, still maintains corporate organization, keeps an office and an office force and collects the rentals from the lessee company and distributes the sums among its shareholders. It has also agreed to keep up its corporate organization, and, if necessary, to use its corporate powers for the benefit of the lessee. And its activities do not stop here. The affidavit in defense filed by the collector, which I understand the Pennsylvania practice takes as true, shows that the company receives annually sums of money as interest on deposits and maintains a contingent fund from which it also receives annual sums as dividends. The return discloses that the amount of dividends re-

ceived for the year ending December 31, 1909, as interest on deposits and from its contingent fund was $24,471.07. The nature and amount of the investments are not specified in the record, but they must be very considerable, in view of the annual income derived.

We are therefore brought to the direct question, Is a live corporation which, though it has leased its railroad property for a term of years, maintains and has agreed to maintain its corporate organization, collects and distributes an annual rental of $252,612, keeps and maintains an office and an office force at large expense, deposits money upon interest and receives and distributes the earnings thereof, invests a large fund which, together with interest on deposits, yields over $24,000 a year, doing business within the meaning of the Corporation Tax Act? The amount of business done is utterly immaterial. The doing of any business with the advantages which inhere in corporate organization brings the corporation within the terms of the act. Such was the ruling in the *Flint Case*, after full consideration by this court of the terms and scope of the law.

It is said, however, that this case is controlled by the ruling in the *Zonne Case*, which was decided at the same time as the *Flint Case*, 220 U. S. 187. It seems to me that the present case is quite unlike that one. There the corporation which owned a piece of real estate had leased it for a term of 130 years at an annual rental of $61,000 and had at the same time amended its corporate organization so as to limit its powers to the sole purpose of holding the title to the lands leased and of receiving and distributing among its stockholders the rentals that accrued under the lease and the proceeds from any disposition of the land. This was the whole extent of its activity, and the amounts derived therefrom represented its entire income. In that case the court held that the corporation had practically gone out of business and had disqualified

itself from any activity in respect thereof, and therefore did not come within the scope of the act.

In the present case the corporation has not disqualified itself from business activity. It maintains a considerable force in active employment and, entirely apart from the receipts from the railroad lease, so deposits and invests its funds as to create, in these days of low interest upon good investments, an annual income of over $24,000, as appears by its return. The amount derived from investments depends upon the exercise of judgment and the efficiency of management. If business includes everything that occupies the time, attention and labor of men for profit, it seems to me that these facts show that the Minehill Company is carrying on business in the present instance.

I am unable to agree that a corporation whose officers and agents are engaged in its behalf in selecting banks in which to deposit large sums of money, in passing upon and choosing securities in which corporate funds are to be invested, and then in distributing the interest and profits accruing therefrom among its stockholders, is not engaged in doing business in the sense that the corporation in the *Zonne Case* was not.

I think the present case is much nearer the ruling made by this court in the *Corporation Tax Cases* in the matter of the realty companies therein involved. Take, for instance, the Park Realty Company. That corporation was organized to work, develop, sell and convey real estate; to lease, exchange, hire or otherwise acquire property; to erect, alter or improve buildings; to conduct, operate, manage or lease hotels, etc. It appeared that at the time of the imposition of the tax the sole business or property owned by the Realty Company was the Hotel Leonori. It was leased for 21 years at an annual rental of $55,000. The corporation was engaged in no business, except the management and lease of that hotel property,

and was in receipt of no other income than that derived from its rental, and has no assets other than that property and the income thereof. It was held to be doing business within the meaning of the act. The Minehill Company, it seems to me, is doing more and a greater variety of business than was attributed to the Park Realty Company as the basis of the assessment upon it. Others of the realty companies held taxable in the *Corporation Tax Cases*, it seems to me, were engaged in as little business activity as is the corporation herein involved.

With deference to the majority opinion, I think the Minehill Company, upon the facts here adduced, is engaged in business and ought to be held liable to the tax.